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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LEGAL AID SOCIETY OF HAWAII, *et al.*,

Petitioners,

—v.—

LEGAL SERVICES CORPORATION and
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, as a condition of receiving a grant from the Legal Services Corporation ("LSC"), private providers of legal services to the poor can be prohibited by the Federal Government from using non-LSC funds to engage in a broad range of First Amendment advocacy activities on behalf of their indigent clients.

PARTIES TO THE PROCEEDING

Petitioners are the Legal Aid Society of Hawaii, Legal Services of Northern California, Inc., San Fernando Valley Neighborhood Legal Services, Legal Aid Society of Orange County, Alaska Legal Services Corporation, California State Client Council, The Hawaii Justice Foundation, The Impact Fund, and Gary F. Smith.

Respondents are the Legal Services Corporation and the United States of America.

RULE 29.6 LISTING

None of the corporate filers has any parent companies or nonwholly owned subsidiaries.

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LEGAL AID SOCIETY OF HAWAII, *et al.*,
Petitioners,

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LEGAL SERVICES CORPORATION and
UNITED STATES OF AMERICA,
Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners hereby petition this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 145 F.3d 1017 (9th Cir. 1998), and is set forth in the Appendix ("App.") at App. 1a-36a. The final order of the United States District Court for the District of Hawaii is reported at 981 F. Supp.

1288 (1997), and is set forth in the Appendix at App. 37a-68a. The preliminary injunction order of the United States District Court for the District of Hawaii is reported at 961 F. Supp. 1402 (1997), and is set forth in the Appendix at App. 69a-112a.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on May 18, 1998. This Court has jurisdiction to review this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following constitutional provisions, statutes and regulations, set forth in the Appendix, are involved in this case:

1. Unites States Constitution, Amendment I;
2. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321;
3. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009;
4. Department of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440; and
5. Legal Services Corporation, "Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity," 45 C.F.R. Part 1610.

STATEMENT OF THE CASE

A. The Legal Services Corporation Program

In 1974, Congress enacted the Legal Services Corporation Act, 42 U.S.C. §§ 2996 to 2996l. That statute created the Legal Services Corporation, a private nonprofit corporation funded by Congress to "provid[e] financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a). LSC provides such support primarily by making grants to eligible legal services organizations.

In creating LSC, Congress recognized the importance of providing the poor with the full range of legal assistance available to others: "[T]here is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances" and "to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program." *Id.* § 2996(1)-(2). Congress further found that "providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice and assist in improving opportunities for low-income persons . . . ." *Id.* § 2996(3). The Act further provided that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." *Id.* § 2996(5)-(6).

Under the LSC program, legal services organizations are expected to obtain funding from a variety of sources. These include LSC grants, "public" funds,[1] "private" funds,[2] and attorney's fees. In awarding grants to legal services programs, LSC considers the ability of recipient programs to obtain funding from sources other than LSC. *See* Ninth Circuit Supplemental Excerpts of Record, at 57. The district court found in its initial preliminary injunction ruling that "Non-LSC Funds are essential to allow the plaintiff legal services organizations and their attorneys to provide effective services to the poor in the communities they serve." App. 106a.

The importance of legal services programs for the poor cannot be overstated. At a time when the number of people at or below the poverty line is growing at three times the rate of the general population, the continued availability of legal services for the poor is crucial. One out of every four children under the age of six and one out of every five children under the age of 18 live in poverty; for them, access to legal services can mean the availability of support from an absent parent, a decent home to live in, adequate nutrition and health care, relief from a violent living situation, or access to education and vocational skills. For the working poor, who represent 40% of the 23 million people over the age of 18 living in poverty, access to legal services can preserve employment that makes the difference between remaining productive or joining the ranks of the dependent poor.

LSC has explained that

> Legal Services programs across America and the U.S. territories have helped individuals overcome and avoid

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[1] *I.e.*, non-LSC funds from federal, state and local governments, including from state-mandated Interest on Lawyers' Trust Account ("IOLTA") programs.

[2] *I.e.*, non-LSC funds from individuals or entities other than the Government, including funds from the private bar, foundations and charitable organizations.

> dependency by resolving employment disputes, saving small family farms, and settling consumer complaints. They have helped young people remain in school and get access to job training programs. They have helped veterans suffering from exposure to Agent Orange and post traumatic stress disorder. They have helped protect vulnerable elderly people from consumer fraud, and they have helped to provide assistance to victims of natural disasters — hurricanes in Florida, floods in the Midwest, and earthquakes in California.[3]

The district court in the present case also found that "[t]here exists a great and substantial need for the provision of legal services to the poor." App. 106a.

B. Petitioners

Petitioners are five legal services organization that receive a portion of their funds from LSC; an association of clients of legal services organizations; two private organizations that fund work by legal services organizations; and an attorney who works for one of the petitioner organizations.

The petitioner organizations have provided extensive and vital legal services to the needy in their respective communities for many years. Petitioners often are the only organizations in their communities with the expertise to represent and advocate on behalf of the poor in connection with a wide range of matters, including welfare, housing, domestic and consumer issues. *See* Ninth Circuit Excerpts of Record ("E.R.") 77, 73, 69. To cite but a few examples: Petitioners have engaged in

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[3] LSC, 1994 Annual Report at 3 (Exhibit A to Declaration of Adam M. Cole in support of plaintiffs' motion for preliminary injunction (Jan. 9, 1997)). Recognizing the importance of legal services programs, the United States District Court for the Northern District of Illinois actually issued an unprecedented "Resolution" supporting the continued funding of LSC and declaring that federally funded legal services programs are "essential to the administration of equal justice." Resolution of the United States District Court for the Northern District of Illinois, *reprinted in* 141 Cong. Rec. S6699 (daily ed. May 15, 1995) (statement of Sen. Simon).

advocacy in state legislatures to preserve General Assistance benefits for the disabled (E.R. 4-5); used class actions to provide relief to low-income tenants for unlawful eviction procedures by public housing authorities (E.R. 19-20); sustained the rights of Alaska Natives to engage in subsistence hunting and fishing (E.R. 56-57); worked with Government authorities to provide assistance to sexually abused children (E.R. 62); fought racial discrimination in publicly subsidized housing (E.R. 65); challenged welfare laws that unlawfully infringe the rights of the disabled (E.R. 46); and represented impoverished immigrants in eviction proceedings, immigration disputes and consumer claims (E.R. 33-34).

After reviewing the record submitted below, the district court in this case found that

> The plaintiff legal service organizations and attorneys are an essential, and sometimes the only, source of legal services for the poor in the respective communities they serve in areas such as housing, employment, health care, education and welfare. Without such services, the poor are unlikely to satisfy their most elemental needs and protect their most basic legal interests.

App. 106a.

C. The Challenged Restrictions

Upset by lawsuits which legal services programs initiated against state and local Governments on behalf of welfare recipients, aliens and prisoners (among others), in 1996 certain members of Congress launched a vigorous attack upon the LSC program, charging LSC with "push[ing] social policies down the throats of local governments and citizens" (141 Cong. Rec. S8948 (daily ed. June 22, 1995) (statement of Sen. Helms) (E.R. 88-89)), engaging in "adventurism" (141 Cong. Rec. H5612 (daily ed. June 6, 1995) (statement of Rep. Gekas) (E.R. 84-85)), or serving as "nothing more than an entitlement program for activist lawyers" (141 Cong. Rec. S14603 (daily ed. Sept. 29, 1995) (statement of Sen. Faircloth) (E.R. 90-91)).

Strenuous efforts were made to abolish LSC altogether, although those efforts ultimately proved unsuccessful. However, Congress sharply reduced funding for legal services programs. It also imposed severe new restrictions on the types of representation which legal services organizations that received LSC funding could provide, whether with LSC funds *or otherwise*. Specifically, the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (the "1996 Budget Act"), and the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1997) (the "1997 Budget Act"),[4] barred LSC from providing financial assistance to any entity that engages in a broad range of advocacy and associational activities on behalf of the poor, even if those activities are supported entirely by non-LSC funds. Among other things, the acts bar a recipient of LSC funds from engaging in lobbying in connection with any federal, state or local legislation; initiating legal representation or participating in any other way in litigation, lobbying, or rulemaking involving the reform of any welfare law; initiating or participating in class actions; claiming or collecting attorney's fees, even when authorized by applicable law; or providing any type of legal representation to numerous categories of potential clients (including prisoners or, except in narrow circumstances, nonlawfully admitted aliens).

With the exception of the political hostility to LSC noted previously, the only suggested purpose for imposing these restrictions on the use of non-LSC funds was a stated desire to prevent legal services organizations from using LSC funds to "free-up" non-LSC funds for prohibited uses. *See, e.g.*, 142 Cong. Rec. S2068 (daily ed. Mar. 14, 1996) (statement of Sen. Craig) (E.R. 92-94).

Congress continued the restrictions on LSC recipients' use of non-LSC funds in the current 1998 Budget Act, Pub. L.

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[4] Those statutes are set forth in the Appendix at App. 114a-139a and App. 140a-145a, respectively.

No. 105-119, § 502(a)(2), 111 Stat. 2440, 2510 (App. 146a-154a).

D. The Effect of the Restrictions on Petitioners

The petitioner legal services organizations undertook to comply with the new restrictions. However, it ultimately became clear that they could not do so without seriously undermining the range and quality of legal services offered to their clients and prospective clients. For example:

- Because of the new restrictions, the petitioner organizations in Hawaii and California were forced to discontinue welfare reform advocacy at a critical time in state legislative debates to the detriment of the indigent in those states. E.R. 12, 22.

- Petitioners' inability to bring class actions, which are often the only effective vehicle to redress systemic wrongs, left thousands of impoverished people in the San Fernando Valley without legal expertise to challenge reductions in general relief benefits. E.R. 72-73. As a result, according to a leading advocate for the homeless in Southern California, thousands of people had become homeless or were forced to forgo basic necessities of life. *Id.*

- The prohibition against legislative or administrative advocacy prevented Legal Services of Northern California from appearing before Sacramento County authorities to prevent implementation of new policies to deny health benefits to undocumented immigrants. E.R. 22-23. That prohibition also has prevented the Alaska Legal Services Corporation from advocating the interests of indigent Alaska Natives before governmental agencies threatening to restrict the customary subsistence hunting and fishing practices of Alaska Natives. E.R. 57-58.

- The prohibition against seeking or collecting attorney's fees in cases not supported by LSC funds has deprived

the petitioner organizations of hundreds of thousands of dollars (E.R. 20-21, 54) and imposed unique disabilities on legal services clients — and legal services clients alone — in litigating against governmental agencies and others (where the availability of attorney's fees is often an essential ingredient in the litigation process) (E.R. 53-55, 21).

- The prohibition against providing legal assistance to most categories of undocumented aliens has forced the California petitioners to turn away numerous impoverished immigrants, with the consequent threat of loss of housing, health care and other basic necessities. E.R. 24-25, 33-34.

- The prohibition against providing litigation assistance to prisoners has prevented the Legal Aid Society of Orange County from using non-LSC funds to represent prisoners in bringing claims of abuse, constitutional deprivations, and prison overcrowding. E.R. 45. The restrictions have barred the Legal Aid Society of Orange County from continuing or bringing any new lawsuits challenging the legality of welfare restrictions. E.R. 46.

In light of this evidence, it is not surprising that the district court initially found that

> The enforcement of restrictions on the use of Non-LSC Funds by the plaintiff legal services organizations and attorneys has had and, if not enjoined, will continue to have an irreparable adverse effect upon the ability of the plaintiff legal services organizations and attorneys to provide services to their clients and prospective clients in the types of disputes and the types of proceedings prohibited under the federal restrictions.

App. 107a.

E. Proceedings Below

1. The Underlying Complaint and Preliminary Injunction Motion

On January 9, 1997, petitioners filed the present lawsuit in the United States District Court for the District of Hawaii asserting that the new restrictions on the use of *non-LSC* funds by recipients of LSC funds constituted an unconstitutional condition on petitioners' exercise of their First Amendment rights of speech, petition and association.[5] At the same time, petitioners moved for a preliminary injunction. On February 14, 1997, the district court granted that motion in material part, finding that the new restrictions appeared to violate petitioners' First Amendment rights. App. 75a-79a, 109a-110a.

In reaching that conclusion, the court analyzed a trio of recent Supreme Court cases in which this Court has addressed Congress's power to impose conditions on the grant of federal funds: *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), and *Rust* v. *Sullivan*, 500 U.S. 173 (1991). Under those cases, the district court concluded that Congress may select what to subsidize but may not preclude recipients of government funds from using *non*-LSC funds to pursue unsubsidized activities that are constitutionally protected. App. 89a.

At the time of the preliminary injunction hearing, applicable LSC regulations prohibited recipients of LSC funds from engaging in any restricted activities either directly or through any organization under its "control."[6] Because of the breadth of the term "control," as defined by LSC's regulations,[7] the

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[5] The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346.

[6] 50 Fed. Reg. 49,276, 49,279-80 (Nov. 29, 1985) ("Audits and Accounting Guide for Recipients and Auditors").

[7] The regulations defined "control" as "the direct or indirect ability to: (a) Determine the direction of management and policies; or (b) influence the management or policies of another organization to the extent that an arm's

(footnote continued...)

district court concluded that the legislation and implementing regulations did not afford recipients "adequate alternative channels" for the exercise of their First Amendment rights. App. 91a-93a & 96a.

2. LSC's Revision of Its Regulations

LSC responded to the district court's preliminary injunction order by revising its regulations. It initially promulgated an "interim rule" which made "limited adjustments" to the previous "interrelated organizations" rule.[8] However, in public comments, petitioners (and others) explained that the proposed new regulation continued to impose restrictions that impermissibly impaired petitioners' ability to provide effective representation to their clients, and went beyond what *Regan*, *League of Women Voters* or *Rust* permits.

Following the submission of public comments, LSC promulgated final regulations.[9] Those regulations deleted any reference to "control" between the LSC recipient and other organization. However, the critical "program integrity" requirements contained in the original regulations remained effectively unchanged:

> (a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have

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(continued from previous page)
length transaction may not be achieved." The regulations further enumerated a nonexhaustive list of "[i]mportant facts" relevant to the determination of "control," including the "[e]xtent and pattern of any overlap of officers, directors, or other managers among organizations"; "[c]ontractual and financial relationships; "[h]istory of relationships among the organizations"; and "[c]lose identity of interest." *Id.*

[8] LSC, "Use of Non-LSC Funds," 45 C.F.R. Part 1610, 62 Fed. Reg. 12,101 (Mar. 14, 1997).

[9] LSC, "Use of Non-LSC Funds, Transfer of LSC Funds, Program Integrity," 45 C.F.R. Part 1610, 62 Fed. Reg. 27,695 (May 21, 1997) (App. 155a-181a).

objective integrity and independence from such an organization if:

> (1) The other organization is a legally separate entity;
>
> (2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities; and
>
> (3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but not be limited to:
>
> > (i) The existence of separate personnel;
> >
> > (ii) The existence of separate accounting and timekeeping records;
> >
> > (iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and
> >
> > (iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.

45 C.F.R. § 1610.8(a).

3. The Parties' Cross-Motions for Summary Judgment and the District Court's Final Judgment

Following issuance of its final regulations, LSC and the United States (which was permitted to intervene by stipulation following the preliminary injunction ruling) moved for summary judgment, asserting that, by essentially duplicating the regulations upheld by this Court in *Rust*, LSC's new regulations

necessarily remedied any constitutional deficiencies, thereby defeating petitioners' claims as a matter of law.

Petitioners opposed those motions and cross-moved for summary judgment on the ground that LSC ignored critical differences between LSC's rules and the Title X rules at issue in *Rust*, as well as the different factual circumstances of *Rust* and the present case. Petitioners also submitted extensive declarations demonstrating the impracticabilities and consequences of operating entirely separate organizations to engage in prohibited advocacy activities.[10] For example, petitioners explained that the prohibition against shared staff between LSC recipient and separate organization effectively would eliminate the provision of restricted services to the indigent in many circumstances.[11] At a minimum, petitioners attested, the prohibition against sharing of staff or facilities would make it prohibitively expensive for petitioners to deliver restricted legal services.[12] *LSC filed no responsive declarations as to any of this evidence.*

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[10] *See* E.R. 178-80, 171-74, 162-64, 166-67.

[11] *See* E.R. 162-63 (the Legal Aid Society of Hawaii does not have the resources to staff many of its offices with more than lawyer, thus making "separate" organizations impossible); E.R. 167 (Legal Services of Northern California "could not afford to rent separate facilities at each of [its branch] locations or split its small branch staffs into separate organizations, with separate photocopiers, postage meters, burglar alarms, fax machines and telephones"); E.R. 185-86 (Alaska Legal Services Corporation lawyers must undertake "arduous" travel in "arctic conditions"; under LSC's rules, two separate lawyers would have to endure those conditions, a financial impossibility).

[12] For example, a centerpiece of the Legal Aid Society of Orange County's program is a telephone hotline (a concept actively promoted by LSC) on which lawyers dispense legal advice to tens of thousands of indigent callers a year. It would be financially impossible, and economically senseless, for that organization to set up a second hotline for restricted advice. E.R. 178-80. Similarly, San Fernando Valley Neighborhood Legal Services has centralized its operations to facilitate the delivery of legal services to its large client community. Were that organization required to set up separate organizations to provide restricted and nonrestricted services, it would be

(footnote continued...)

Notwithstanding the record, the district court granted summary judgment to LSC and the Government and denied summary judgment to petitioners. The court held that the new regulations rectified any prior constitutional deficiencies by providing LSC-funded organizations with the ability to carry out otherwise restricted activities through an affiliate organization under the "control" of the LSC-grantee. App. 56a-60a. "Control," the court said, effectively was synonymous with the ability to have overlapping boards of directors since, as the court acknowledged, the new rules still require a virtually complete separation of both professional (and other) staff and physical facilities. *Id.* at 56a-57a. As for petitioners' *unrebutted* showing that the new rules still materially impeded LSC-funded organizations from exercising their First Amendment rights, the court noted simply that "the unconstitutional conditions doctrine does not require a regulation to eliminate all practical difficulties . . . in order to pass constitutional muster." *Id.* at 53a.

4. The Court of Appeals' Ruling

The court of appeals affirmed. Again, relying primarily on *Rust*, it rejected petitioners' unconstitutional conditions argument, stating that "[t]he regulations promulgated by the LSC to preserve the distinction between restricted and unrestricted organizations are nearly identical to the regulations upheld in *Rust* and there is no basis for distinguishing this case from *Rust*." App. 18a. The court of appeals characterized the fact that the regulations in *Rust* applied only to "projects," whereas the LSC restrictions apply to "grantees," as an inconsequential "difference in terminology." *Id.* at 22a. The court explained: "*Rust* does not suggest that the Title X regulations are the maximum permissible separation

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(continued from previous page)
subject to losing funds from *non-LSC* sources, virtually all of which demand that programs minimize administrative and management costs. E.R. 172.

requirements that the government can impose and we decline to find that the minor additional requirement present in this case [*i.e.*, that the grantee itself may not engage in restricted activities] has constitutional significance." *Id.* at 27a.

Like the district court, the court of appeals also saw fit "only briefly [to] discuss" petitioners' elaboration of hardships imposed by the challenged restrictions. *Id.* at 25a. Characterizing petitioners' challenge as a "facial challenge," the court rejected petitioners' claim on the ground that the challenged regulations apply on a "case-by-case" basis and LSC had not yet determined how it would apply the regulations. *Id.* at 25a-26a.[13]

The court of appeals further rejected petitioners' contention that *Rust*, unlike the present case, involved what this Court has characterized as a government program that "used private speakers to transmit specific information pertaining to its own program." App. 27a. *See Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819, 833 (1995). Finally, the court rejected petitioners' contention that because First Amendment rights are implicated, the Government was obliged to meet a heightened burden of demonstrating that its restrictions were no more onerous than necessary to protect the

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[13] The only factual material on which the court of appeals relied (to suggest that the challenged restrictions do not impose hardships) was a declaration by LSC's general counsel stating that one legal services lawyer in New York had continued to work part-time on a restricted class action. App. 26a, 30a. However, that lawyer submitted a declaration specifically responding to LSC's declaration in which the lawyer attested to the extreme difficulties caused by that part-time arrangement and explaining that his experience "illustrates [that part-time work is *not*] a solution to the ethical and constitutional problems created by the challenged restrictions." Declaration of Davis S. Udell (Feb. 3, 1997) (Exhibit C to Declaration of Bradford L. Tannen in support of plaintiffs' reply memorandum in support of motion for preliminary injunction (Feb. 4, 1997)).

Government's interest in preserving the integrity of its funding. App. 27a-29a.[14]

REASONS FOR GRANTING THE PETITION

THE PETITION SHOULD BE GRANTED TO CONSIDER THE RELATIONSHIP BETWEEN THE UNCONSTITUTIONAL CONDITIONS DOCTRINE AND THE AUTHORITY OF CONGRESS TO DETERMINE THE CONDITIONS FOR USE OF ITS OWN FUNDS

This case arises at the intersection of two important constitutional principles: First, that Congress has the prerogative to determine for itself what programs or activities it wishes to subsidize and, second, that it may not condition a grant of funds upon the recipient's relinquishment of constitutional rights. The question presented by this case is where — and how — to draw the line between those two potentially conflicting principles. According to the court below, that is a question with a singular answer: this Court drew the line in *Rust* which, in the Ninth Circuit's view, creates a template against which future funding limitations may be tested for constitutional fit.

Petitioners submit that that approach sweeps too broadly — sweeping in cases (such as the instant one) in which the federally funded program is quite different from the program at issue in *Rust*, while sweeping out important decisions of this Court which should be read together with *Rust* to establish a coherent constitutional principle that respects both

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[14] A separate challenge to the LSC restrictions currently is pending in the United States Court of Appeals for the Second Circuit. Legal services organizations and other entities in New York brought an action similar to the instant one in the United States District Court for the Eastern District of New York. *Velazquez* v. *LSC*, No. 97-CV-182(FB) (E.D.N.Y.) (amended complaint filed Jan. 27, 1997). The district court denied plaintiffs' application for a preliminary injunction. 985 F. Supp. 323 (E.D.N.Y. 1997). That ruling is on appeal in the Second Circuit, which has heard argument but has not yet issued a decision (No. 98-6006).

congressional funding prerogatives and the constitutional liberties of those who receive federal funds.

A. The Court Below Misapplied *Rust* v. *Sullivan*

1. In *Rust*, this Court upheld regulations which forbade Title X family-planning programs from engaging in various abortion-related activities and counseling. In doing so, however, the Court was careful to distinguish between regulations which limit what may be done under the aegis of a particular federally-funded *program* and limitations upon a *recipient* of federal funds. 500 U.S. at 196. In addition, the Court noted that even within the zone of otherwise permissible "separation" there are certain "traditional sphere[s] of free expression" that are "fundamental to the functioning of our society." *Id.* at 200. Within those areas, the Government's authority to impose limitations upon protected activity even as an incident to receipt of a government subsidy is less broad. The Court further observed that the doctor-patient relationship ordinarily might fit within that protected paradigm but that the particular "relationship established by the Title X program" was not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." *Id.*

The Court further explicated *Rust* in *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), which dealt with (and rejected) the University of Virginia's attempt to deny funding to a student publication on the basis of its viewpoint. Relying upon *Rust* and *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the University unsuccessfully argued that it was authorized to allocate its limited resources as it saw fit. Speaking of *Rust*, the Court said:

> [In that case,] the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. . . . When the

> government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to insure that its message is neither garbled nor distorted by the grantee.

515 U.S. at 833.

2. The court of appeals in this case brushed aside the careful limitations which this Court articulated in (and about) *Rust*, effectively supplanting prior precedent with a mechanistic "one size fits all" standard that establishes a broad zone within which Congress assertedly has the authority to limit a grantee's conduct of constitutionally protected activities in the name of protecting congressional funding prerogatives.

In doing so, petitioners submit that the court below materially overread *Rust* and inappropriately eroded the unconstitutional conditions doctrine. That is an issue which this Court ought to consider not only because of the importance of preserving the effectiveness of the legal services program but because the sensitive interplay between the unquestioned authority of Congress to restrict its own funding and the equally well-settled inhibitions established by the unconstitutional conditions doctrine involves an exceedingly important area of constitutional jurisprudence.[15]

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[15] There is no dispute that important "constitutional rights are at stake" here. The district court so found (App. 75a), and that conclusion was not questioned by LSC or the United States on appeal or by the Ninth Circuit in its opinion. These rights include, *inter alia*, the right of petition in judicial, legislative and administrative matters (*e.g.*, *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961); *NAACP* v. *Button*, 371 U.S. 415, 437 (1963)), and the right to associate in pursuit of such interests (*e.g.*, *Brotherhood of R.R. Trainmen* v. *Virginia* 377 U.S. 1, 5 (1964); *United Mine Workers of Am.* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 221-22 (1967)). Legal services organizations also have a First Amendment right to provide services to those who retain them. *In re Primus*, 436 U.S. 412, 431 (1978); *Button*, 317 U.S. at 437.

Unlike the situation in *Rust*, the restrictions in this case literally operate on an LSC "recipient," not a "program." The court of appeals dismissed that distinction as trivial, or as an effort by petitioners to elevate the significance of corporate formalities. App. 22a, 27a. Yet this Court's pointed distinction between "program" and "recipient" cannot be so easily dismissed. Particularly when read in conjunction with its earlier decisions in *Regan* and *League of Women Voters*, as well as its subsequent opinion in *Rosenberger* (*see infra*), it seems apparent that the Court's intended point in *Rust* was that the Title X restrictions were permissible only because they operated on the Government's own limited "program," within which Congress was authorized to define the scope of permissible activities.[16]

Regardless of how closely the regulations in this case may mimic the rules upheld in *Rust*, we do not believe that that decision can fairly be read to support the proposition that Congress can impose any kind of burdens upon constitutionally-protected conduct by a recipient of federal funds so long as it allows the recipient the right to establish some other — legally and physically — separate organization to engage in those congressionally-proscribed activities.

Put otherwise, petitioners' concerns here are not about corporate *formalities*, but corporate *realities*. Whether or not Planned Parenthood of New York (one of the petitioners in *Rust*) established a separately-staffed Title X program, it still was Planned Parenthood, a single organization with coherent

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[16] Even under that relaxed standard, the regulations at issue in *Rust*, which imposed nontrivial burdens on recipients of Title X funds that wished to engage in restricted activities, plainly pushed the outer edges of the constitutional envelope. Four Justices, in fact, thought that the regulations went too far, as had several lower court judges. *See* 500 U.S. at 203; *Massachusetts* v. *Secretary of HHS*, 899 F.2d 53 (1st Cir. 1990), *cert. granted & judgment vacated*, 500 U.S. 949 (1991); *Planned Parenthood Fed'n of America* v. *Sullivan*, 913 F.2d 1492 (10th Cir. 1990), *cert. granted & judgment vacated*, 500 U.S. 949 (1991).

direction and identity. By contrast, it is hard to see how a legal aid organization that must set up an entirely new legal entity run by different people, using different facilities is in any meaningful respect the *same* recipient at all.

As LSC construes the new regulations, the separate organization may share overlapping boards, but not overlapping executive staff or, to any material degree, attorneys or facilities.[17] While it may be possible in formalistic terms to equate a corporation with its board of directors, to do so scarcely would correspond with the way in which organizations such as LSC grantees actually operate, nor would it correspond to any meaningful sense of what it means to allow an LSC grantee to engage in restricted activities using entirely non-LSC funds.[18] Whatever the metaphysics of corporate "identity," at some point A ceases to be A and becomes B, or C or X. And, at that point, the conclusion that A is exercising *its* First Amendment rights, rather than having them exercised *by someone else* — a circumstance which, we trust, not even LSC or the United States would attempt to defend[19] — becomes inescapable.

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[17] *See* Memorandum from John Tull, Director, LSC Office of Program Operations, to all LSC Program Directors, Board Chairs, re Certification of Program Integrity (Oct. 30, 1997), Addendum to petitioners' Ninth Circuit Reply Brief ("Addendum"). That memorandum expressly states that "sharing an executive director . . . inappropriately tends to blur the organizational lines between [LSC and non-LSC-funded] entities." Addendum at 10. Grantees also are cautioned that a 10% overlap of part-time attorneys or legal assistants is the most that typically will be tolerated, *id.* at 6, and that grantees should be "cautious" about sharing any "space or facilities" — "particularly . . . if the two organizations employ *any* of the same personnel," *id.* at 10 (emphasis added).

[18] Barring all but overlapping boards of directors also ignores the question of just how broad a buffer zone Congress may insist upon in order to insure that its funds are not being spent for unauthorized purposes. We discuss this issue in Section B, *infra*.

[19] *See Regan*, 461 U.S. at 553 (Blackmun, J., concurring) ("[i]t hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him"); *see also Schneider* v.

(footnote continued...)

Equally important, Title X did not intend to establish a "comprehensive" professional relationship in the way that LSC grantees do. Rather, Title X was a specific project of the Federal Government intended to "convey a governmental message" about family planning. *Rosenberger*, 515 U.S. at 833. By contrast, unlike the situation in *Rust*, the Legal Services Corporation Act is intended to fund a broad-based, "comprehensive" lawyer-client relationship defined not by particular types of legal services (in the way Title X dealt only with family-planning) but by the income level of clients.[20] The consequence of that fact is that the type of encompassing professional relationship that the Court found lacking in *Rust* is unmistakably present here, with all that that implies for the ability of Congress to infringe upon the "traditional sphere" of First Amendment activity inherent in the relationship between lawyer and client. *See Rust*, 500 U.S. at 200.

Finally, the court of appeals failed to read *Rust* in light of the Court's description of that case in *Rosenberger*. Since the Title X "program" was established to deliver the Government's "own" message (515 U.S. at 833) the Government had far greater discretion to define, and circumscribe, the limits of its funding than it does in a case, such as the present one, in which the Government, quintessentially, has "create[d] a program to encourage private speech." Even the fact that the regulations in *Rust* were content-based was beside the point where the Government's own "message/program" was in issue (as opposed to the rights of LSC "recipients" to deliver a full range

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State, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

[20] Thus, the statute creating the LSC broadly provides that grantees are to "provid[e] financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a). A comparable statute in *Rust* would have been, *e.g.*, a law funding inner-city medical clinics to provide indigents with all forms of non-surgical medical care.

of legal services to their clients in accordance with their best professional judgment and responsibilities, *see* 42 U.S.C. §§ 2996(6), 2996e(b)(3)).

It cannot seriously be suggested that the position of the Government here is analogous to that of the doctors in *Rust* — to wit, "private speakers" retained by the Government "to transmit specific information pertaining to [the government's] own program." 515 U.S. at 833. Not only is the role of LSC grantees vastly broader, but their obligation frequently is *to sue* the Government on behalf of their respective clients. *See, e.g.*, *Polk County* v. *Dodson*, 454 U.S. 312, 318 (1981).

3. The consequences of the Ninth Circuit's misreading of *Rust* are substantial and merit review. As a legal matter, the court's interpretation of *Rust* effectively transforms it into a "judicial juggernaut," *Rosenberger*, 515 U.S. at 833, rendering earlier precedent effectively irrelevant. The opinion further reduces the carefully articulated distinction between grantees and programs to a meaningless formality and, effectively, reads out of the case entirely the pertinence of the lawyer-client relationship as an important sphere of First Amendment concern, as well as *Rosenberger*'s distinction between the creation of the Government's own program and an effort to encourage "private" speech by others.

As a practical matter, the Government's attempt to impose a "separate entity" superstructure on legal services organizations will severely inhibit organizations, like petitioners, from providing effective legal services to their clients. The record in this case demonstrates, without attempted rebuttal or contradiction by LSC or the Government, that many programs will be foregone entirely, while others will be rendered far less effective. *See* notes 11-12, *supra*. That is a particularly unfortunate development at a time when the legal rights of the poor are under assault on a variety of fronts and the gap between rich and poor is increasing. Moreover, protecting the *process* of justice, surely, is a matter of substantial concern to this Court which, after all, is the ultimate arbiter of that process. Indeed, the impetus for the creation of the federal

Legal Services program was the broadly-shared recognition that insuring all citizens effective access to legal assistance was one of the surest ways of maintaining a broad commitment to the rule of law generally. *See, e.g.*, 42 U.S.C. § 2996(4) ("for many of our citizens the availability of legal services has reaffirmed faith in our government of laws").

At a minimum, the decision below demonstrates that there is an important level of ambiguity about the intended scope and application of *Rust* — including its interplay with earlier cases — that only this Court can clarify. Given the significance of this case for the provision of legal services to the poor, as well as the increasing prevalence of conditions upon federal appropriations, that is an issue which deserves this Court's attention.[21]

B. The Writ Should Be Granted To Clarify the Legal Standard for Determining When a Restriction on the Use of Federal Funds Represents an Unconstitutional Condition

As recent cases such as *Regan, League of Women Voters* and *Rust* demonstrate, there often is an unavoidable tension between efforts by Congress to limit the uses to which its funds are put and restrictions which have the effect of burdening the exercise of constitutionally-protected rights. While these two competing principles are easy enough to articulate (and often relatively easy to apply), merely defining an outcome in terms of one rather than the other does not provide adequate guidance

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[21] That the court of appeals materially overread *Rust* is also suggested by this Court's decision last term in *National Endowment for the Arts* v. *Finley*, 118 S. Ct. 2168 (1998). While the Court in that case rejected a facial challenge (*see* note 31, *infra*), the majority pointedly noted (quoting *Regan*) that "even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'" 118 S. Ct. at 2178. Here, of course, the whole point of the "subject matter/process" restrictions imposed by Congress on LSC grantees is to make it more difficult (to say the least) for such grantees to advance certain disfavored causes on behalf of the indigent clients whom they are directed to serve.

as to the standards and process for resolving the tension where it exists. Thus, for example, once it is determined that a restriction falls into one category rather than another the result in a particular case follows as a matter of course. But how far can Congress go in the name of insuring that its funding prerogatives have been respected? What standard must be met in imposing such restrictions and who bears the burden of demonstrating that the standard has been met?

Petitioners argued in the court below that Congress's authority to limit the use of federal funds gives it only the authority to do what is *necessary* in a particular case to insure that its funding limits are respected. *See Regan*, 461 U.S. at 533 (Blackmun, J., concurring) (viewing the limitations in that case as permissible "[a]s long as the IRS goes no further than" necessary to meet its aims). We further argued that that principle was consistent with the *Regan/League/Rust* trilogy.

The Ninth Circuit — which characterized petitioners' argument as a "compelling interest" or "strict scrutiny" test — rejected the argument as unsupported by *Rust* (or by *Regan* and *League*, for that matter). App. 27a-29a. But while the Court has announced whether particular restrictions fall on one side or the other of the funding/burden line, it has not explained either the process or the standards by which that line is to be drawn. These matters need to be articulated by this Court in the same way that it has addressed the issue of standard and burden in other First Amendment contexts, such as viewpoint restrictions,[22] commercial speech,[23] and time, place and manner[24] cases.

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[22] *See, e.g., City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

[23] *See, e.g., Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563-66 (1980).

[24] *See, e.g., Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 535-36 (1980).

While the Court has not, in our view, clearly articulated the standard to be applied in cases such as the present one, petitioners submit that the appropriate principle can be derived from *Regan*, *League* and *Rust*. Specifically, we believe that in each of those cases, the Court considered the restrictions imposed in the context of their anticipated effect and in light of what was needed to preserve Congress's funding decisions in the particular case. Thus, for example, in *Regan*, Congress agreed to subsidize certain activities by allowing the organizations conducting them to be exempt from federal taxation. It further agreed to encourage support of some (but not all) of those activities by allowing donors to deduct their contributions to organizations engaged only in those activities. Specifically, it refused to allow taxpayers to deduct contributions to organizations engaged in lobbying. 461 U.S. at 543-44.

In order to effectuate that demarcation, it was *necessary* to require charitable groups to establish two legally distinct organizations so that prospective taxpayer-donors would know whether their contributions were tax-deductible. Equally clearly, the two organizations needed to set up an adequate accounting system to insure that funds given for a tax-deductible purpose were used to support only the activities that Congress was willing to have subsidized in that fashion.

Those regulations were both necessary and sufficient to the purpose at hand. And, since Congress and the IRS went no further than required, the restrictions were lawful. However, the language of both the majority and the concurring opinions leaves little doubt that anything more would have been too much from a constitutional standpoint. *See* 461 U.S. at 545 n.6; *id.* at 553-54 (Blackmun, J., concurring).

In *League of Women Voters*, the fatal vice in the Government's restrictions on editorializing by recipients of public broadcasting funds was that the restrictions did not allow a public broadcasting station any way to editorialize if it took any federal money. What Congress should have done, said the Court, was allow recipients to create a separately-funded

organization which could "*use the station's facilities*" to editorialize, using no federal funds. 468 U.S. at 400 (emphasis added). Further, the Court observed that if Congress were concerned about viewers being confused about the sponsorship of a station's editorials, it could require a clear disclaimer. *Id.* at 395. Once again, the Court's analysis was tailored to the specific facts and necessities of the particular case.

Rust did not establish any new or different legal standard. Rather, it was based on exactly the same underlying constitutional premise as *Regan* and *League*, to wit: that Congress can limit its support to specified recipients and activities and can enact rules necessary to be sure that its funding limits are respected. To insure that the nature of the Government's own approved message about family-planning was kept distinct, Congress insisted that recipients establish a separate program using, *e.g.*, separate examination and waiting rooms and separate medical personnel. Given the limited nature of the program and the fact that it was designed to convey the Government's views of acceptable family planning (rather than establish a "comprehensive" program of medical care for the indigent) a majority of the Court concluded that it was reasonable for the Government to structure its program so that its message about family-planning would not be garbled or confused by doctors who also engaged in abortion counseling. Contrary to the decision below, which placed dispositive weight on *Rust* (as if *Regan* and *League* had been overruled, or at least rendered analytically irrelevant, by *Rust*), there is no suggestion that the Court intended to create an all-purpose standard for unconstitutional conditions cases regardless of their particular facts or the nature of the Government's asserted interests.[25]

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[25] That is not only clear from the opinion in *Rust*, but it can be tested by hypothetically changing the chronology of the three cases and asking whether *Regan* would have come out the same way if the IRS had imposed the same separation regulations as in *Rust*, or whether the Court in *League* would have approved regulations requiring the "editorializing" affiliate to obtain a separate license and set up a duplicate broadcasting facility.

(footnote continued...)

That precedent aside, petitioners submit that allowing Congress, in effect, to burden the exercise of important First Amendment freedoms through the imposition of content-based restrictions without any showing that such restrictions are needed to insure respect for its funding limitations would be inconsistent with this Court's First Amendment jurisprudence in fundamental respects.[26]

This Court has refused implacably to allow the Government to impose such restrictions without subjecting its asserted justifications to the most searching inquiry.[27] The fact that, here, the issue arises as an ostensible choice between competing

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Petitioners suggest that there can be little doubt as to the answer. In both cases, the Court would have asked whether the additional requirements were necessary to satisfy the Government's interest in insuring the integrity of its funding limitations and in both cases it would have found that they were not and, hence, were constitutionally impermissible.

[26] In *Rust*, the Government relied upon the results of a GAC study, which indicated that there was a risk that the public would mistakenly assume that federal funds were being used for abortion activities. 500 U.S. at 188. Here, by contrast, Congress has imposed strict bookkeeping requirements on LSC recipients since the very inception of the act to insure that LSC funds are used only in the manner authorized. Despite more than twenty years of experience with those regulations, LSC offered no suggestion in the district court that they had proved inadequate to insure that congressional funding limitations were being respected.

In the courts below, LSC and the Government also argued that separation (legal and physical) was appropriate to be sure that clients and the public were not confused about the limits of federal sponsorship. While petitioners question whether that justification could ever be sufficient to support a material inhibition on the exercise of First Amendment rights, the Court need not go that far since it has held repeatedly that disclaimers or other identifications are adequate mechanisms to protect against the possibility of such confusion. *See, e.g., League of Women Voters*, 468 U.S. at 395; *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 87 (1980); *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 769 (1995); *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 655 (1994).

[27] *See, e.g., Reno* v. *ACLU*, 117 S. Ct. 2329, 2342-43 (1997); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

legal principles should not obscure the fact that there often will be no "either/or" outcome and that it is necessary to draw a line which accommodates one set of values at the potential expense of another.

In the purported name of protecting its power to fund only what it wishes to fund, Congress has drawn up a broad set of "off-limits" topics[28] and tactics[29] and has required grantees to set up a broad buffer-zone of separation as demonstrated proof that restricted activities are not being conducted (regardless of the funding source), except by some other "objectively independent" organization, using separate personnel and separate facilities. The consequence of this jerry-built structure — not disputed by LSC on this record — is that LSC grantees are constrained by avowedly content-based restrictions which require them to operate under a system of mandated inefficiency (at the least) or outright disability (frequently) in attempting to exercise their constitutionally-protected rights to provide effective legal advocacy for the poor *using no LSC funds*.

Petitioners suggest that the application of traditional First Amendment analysis to those facts ought to inform — if not control — the relevant inquiry into the constitutionality of LSC's restrictions. In our view, this Court's historic hostility to limitations which infringe on First Amendment rights requires LSC to bear the burden of showing why it is necessary to go beyond accounting separation which, seemingly, has worked satisfactorily for the past two decades. *See, e.g., Reno*, 117 S. Ct. at 2348 (searching inquiry required in cases involving content-based limitations); *Consolidated Edison*, 447 U.S. at 536 (same).[30] To defer, instead, to congressional (or agency)

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[28] *E.g.*, participating in welfare reform, representing prisoners, representing most categories of undocumented aliens.

[29] *E.g.*, lobbying, collecting attorney's fees, participating in class actions.

[30] Not only are the regulations in this case — on their face — broader than necessary, but there is no evidence that Congress or LSC even considered whether such draconian rules are required to insure that Congress's power

(footnote continued...)

judgments on such matters, without subjecting them to a stringent level of scrutiny, invites Congress and federal agencies to impose requirements in the name of "separation" that, in fact, are merely intended to place added obstacles in the path of fund recipients and, thereby, impede their ability to engage in constitutionally-protected conduct.[31]

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to restrict the use of its funds is respected. Yet, as this Court noted in *Turner Broadcasting System, Inc.* v. *FCC*:

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." It must *demonstrate* that the recited harms are real, not merely conjectural, and that the regulations will in fact alleviate these harms in a direct and material way.

512 U.S. at 664 (citations omitted; emphasis added); *see also Reno*, 117 S. Ct. at 2346; *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 129 (1989). Here, by contrast, in ostensibly seeking to restrict their own funding, Congress and LSC have adopted regulations which, effectively, "burn the house to roast the pig." *Sable*, 492 U.S. at 127 (quoting *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957) (Frankfurter, J.)).

[31] In addition to whatever arguments LSC and the Government may make on the merits, we expect that they also will contend that certiorari should be denied because petitioners raise a "facial challenge." In raising that argument, respondents are likely to point to this Court's decision last term in *National Endowment for the Arts* v. *Finley*, 118 S. Ct. at 2168, in which the Court rejected a facial challenge to a provision of the NEA Act requiring the NEA to "tak[e] into consideration general standards of 'decency and respect' for diverse beliefs and values of the American public" when making grants to artist applicants. *See also* App. 16a-17a.

In fact, *Finley* demonstrates why this case presents a proper facial challenge. In that case, the Government sought to control the use of *its* funds (not artists' non-NEA funds) and the statute did no more than direct the Government to "tak[e] into consideration" the challenged standards, not to require that a given grant application meet those standards. 118 S. Ct. at 2175. Indeed, the Court explicitly relied upon the fact that the NEA, itself, regarded the "decency" proviso as purely "hortatory." *Id.* Moreover, in light of the vast excess of applications to available funds, there was no reason to anticipate that any given grant application would even be decided

(footnote continued...)

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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based on the disputed standard. *Id.* at 2177-78, 2175. Thus, the Court ruled, a "facial" challenge was inappropriate.

Here, by contrast, the unconstitutional effects of the challenged statutes and regulations are immediately present in all cases. The requirement that petitioners set up entirely separate organizations as the only means of engaging in activities protected by the First Amendment is applicable, and must be taken into account, *in all cases*. That requirement also is unconstitutional *in all cases* because it is more onerous than necessary to satisfy the Government's asserted interests in "program integrity." *See* text, *supra*. Petitioners' claim therefore does not depend on how LSC applies its regulations in a given situation.

Quite apart from *Finley*, the instant case also fits comfortably within the standard First Amendment paradigm in which facial challenges are entertained for overbreadth and vagueness, particularly including situations in which excessive discretion is vested in an agency with power to grant or withhold a permit or some other benefit. *See, e.g., City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988); *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 965 n.13 (1984); *see also Reno*, 117 S. Ct. at 2348, 2346 (sustaining a First Amendment "facial overbreadth" challenge to a statute imposing an "unnecessarily broad suppression of speech").

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-16567

D.C. No. 97-00032 ACK

OPINION

LEGAL AID SOCIETY OF HAWAII, LEGAL SERVICES OF NORTHERN CALIFORNIA, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES, LEGAL AID SOCIETY OF ORANGE COUNTY, ALASKA LEGAL SERVICES CORPORATION, CALIFORNIA STATE CLIENT COUNCIL, THE HAWAII JUSTICE FOUNDATIONS, THE IMPACT FUND, AND GARY F. SMITH,

Plaintiffs-Appellants,

v.

LEGAL SERVICES CORPORATION,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor-Appellee.

Appendix A

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, Chief District Judge, Presiding

Argued and Submitted
March 13, 1998—San Francisco, California

Filed May 18, 1998

Before: Byron R. White,* Associate Justice, (Ret.),
John T. Noonan and Sidney R. Thomas, Circuit Judges.

Opinion by Justice White

SUMMARY

Government Law/Welfare

The court of appeals vacated a judgment of the district court in part and affirmed in part. The court held that regulations of the Legal Services Corporation barring funded indigent legal Services providers from affiliating with activist organizations do not violate the First Amendment.

In 1996 amendments to the Legal Services Corporation Act, Congress placed limitations on funding by the Legal Services Corporation (LSC). The LSC is a private nonprofit corporation that Congress created to allocate grants to organizations that provide civil legal services to indigent persons. The new regulations prohibit recipients of LSC

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* The Honorable Byron R. White, Associate Justice of the United States Supreme Court, (Ret.), sitting by designation, pursuant to 28 U.S.C. § 294(a).

funds from engaging in various types of activities, including political advocacy; representing plaintiffs in class, prisoner, or abortion litigation; representing certain aliens; collecting statutory attorneys' fees; and defending eviction cases in which the defendant is involved in drug trafficking.

LSC promulgated regulations to ensure that LSC grant recipients did not use LSC funds to support prohibited activities: the congressional restrictions applied to any organization "interrelated" with an LSC recipient, as determined by a "control" test. LSC defined control as the ability to determine the direction of management or policies, or to influence those of another organization to the extent that an arm's length transaction cannot be achieved.

After appellant Legal Aid Society of Hawaii and other indigent civil legal services providers challenged the regulations, LSC revised them: a recipient of LSC funds must maintain physical and financial separation from organizations pursuing prohibited activities (unrestricted organizations).

LSC's new "program integrity" regulations were modeled after regulations upheld by the Supreme Court in *Rust v. Sullivan*, 500 U.S. 173 (1991). In *Rust*, the challenged regulations prohibited the use of Title X funding for family-planning projects in which abortion was a method of family planning. The regulations prohibited funding of programs that offered abortion counseling; encouraged abortion as a method of family planning, including lobbying or legal action; or did not maintain objective physical and financial integrity and independence from organizations that conducted the prohibited activities.

The district court ruled that appellant California State Client Council had standing based on the adverse effect the

regulations had on CSCC's ability to use non-LSC money to provide assistance to indigent clients. In the court's view, this was an "injury in fact" that allowed CSCC to challenge the restrictions on behalf of its clients.

On cross motions for summary judgment, the district court ruled for LSC, concluding that the regulations did not violate the First Amendment.

On appeal, Legal Aid contended that because the LSC regulations apply to "recipients," rather than the "projects" that challenged the Title X regulations in *Rust*, they were unconstitutional conditions on the exercise of First Amendment rights. Legal Aid also asserted that because LSC is a program designed to encourage private speech, the regulations were subject to heightened scrutiny, and that the government had to show a compelling interest to place restrictions on the use of non-LSC funds to support activities protected by the First Amendment. In a footnote, Legal Aid complained that the restrictions also violated the First Amendment rights of full-time legal services lawyers by preventing them from pursuing prohibited activities on their own time.

[1] Neither the congressional enactments nor the regulations infringed on First Amendment rights. The LSC regulations promulgated to preserve the distinction between restricted and unrestricted organizations were nearly identical to the regulations upheld in *Rust*, and there was no basis for distinguishing this case from *Rust*.

[2] As in *Rust*, the LSC regulations did not force a recipient to give up prohibited activities; they merely required that the recipient keep such activities separate and distinct from LSC activities. If an organization wished to

engage in prohibited activities, it was simply required to conduct them through entities that were separate and independent from the organization that received the LSC funds.

[3] Legal Aid's reliance on the fact that the term "recipient" was employed in the LSC regulations instead of the term "projects" was misplaced. The constitutional test does not focus on the term used by the government agency, but whether the regulations effectively prohibit the recipient from engaging in the protected conduct outside the scope of the federally funded program. [4] A recipient of LSC funds could engage in conduct protected by the First Amendment outside the scope of the federally funded program if, as in *Rust*, the recipient set up a separate entity that complies with the program integrity regulation.

[5] Legal Aid did not present substantial evidence to support its assertions concerning how the LSC regulations would be interpreted and applied to recipients, and the text of the regulations did not support their arguments. [6] For example, the program integrity regulations did not state that the organizations are limited to overlapping boards of directors, or that no sharing of staff is permissible. Instead, the regulations stated that no factor was determinative, and that LSC would make a case-by-case determination.

[7] Presumably, the restrictions made it more difficult for organizations to engage in prohibited activities. However, similar restrictions in *Rust* required that an organization engaged in abortion activities conduct them through programs that were separate and independent from the project that received Title X funds. That the LSC restrictions might have required additional compliance efforts by a recipient if

it wished to engage in prohibited activities furnished no basis for departing from *Rust*.

[8] It was not significant that the LSC regulations required that the unrestricted organization be a legally separate entity. The combination of the separate incorporation requirement and the program integrity requirement did not create an unconstitutional burden on Legal Aid's exercise of First Amendment rights. Legal services organizations have significant access to legal counsel, and Legal Aid failed to demonstrate how the requirement of filing incorporation papers for an unrestricted organization imposed any significant burden.

[9] The restrictions were not subject to heightened scrutiny. Like the Title X program in *Rust*, the LSC program was designed to provide professional services of limited scope to indigent persons, not to create a forum for the free expression of ideas.

[10] A recipient was not compelled to accept a subsidy from LSC. A recipient could decline the federal subsidy and avoid being subject to the restrictions. By choosing to accept LSC funds, a recipient consented to any restrictions placed on funds or grant-related income. The regulations governed only LSC recipients and related entities that failed to satisfy the program integrity requirements. If the recipient wished to engage in prohibited activities, it remained free to use private funds to finance them if it complied with the separation requirements.

[11] The Supreme Court did not apply a compelling interest test in *Rust*. Legal Aid's threshold strict scrutiny test simply did not exist.

[12] LSC regulations generally prohibited the outside practice of law. The purpose of this provision was to ensure that outside demands did not hinder fulfillment of the attorney's overriding responsibility to serve those eligible for assistance. The restrictions on LSC-funded attorneys were a consequence of the decision to accept full-time employment with an LSC-funded organization. If an attorney wished to engage in prohibited activities, the attorney could work part-time at an unrestricted organization in certain circumstances, or engage on his own time in restricted activities that did not involve the outside practice of law, such as lobbying. The assertion that the restrictions on personnel sharing precluded working part-time at an unrestricted organization was contradicted by the record.

[13] The constitutional minimum of standing contains three requirements. There must be an injury in fact, causation, and redressability. **[14]** The district court conflated the question of whether CSCC had standing to press claims for injury *on its own behalf* with the question of whether CSCC had representative standing to assert claims *on behalf of its members*. **[15]** The court erred in basing its conclusion on an affidavit claiming that CSCC *as an organization* suffered an adverse impact from the restrictions. This was contrary to the requirements for representative standing. There was nothing in the record to suggest that any individual member of CSCC had standing.

[16] The "injury in fact" test requires that the party seeking review be himself among the injured. To survive a summary judgment motion, Legal Aid had to submit affidavits or other evidence showing that *one or more of its members* was directly affected apart from their special interest in the subject. CSCC failed to establish that it had standing to assert the rights of its members.

[17] The Supreme Court has recognized the right of litigants to bring actions on behalf of third parties, provided that there is an injury in fact, a close relation to the third party, and some hindrance to the third party's ability to protect his or her own interests. Legal Aid made no showing that its clients were unable to assert their own interests.

COUNSEL

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David M. Young, Daniel J. Popeo, Washington Legal Foundation, Washington, D.C., for Washington Legal Foundation, Allied Educational Foundation, and United States Representative Bill McCollum as amici curiae in support of appellees.

Appendix A

OPINION

WHITE, Associate Justice, (Ret.):

The issue presented in this appeal is whether government restrictions on the activities of organizations who accept funds distributed by the Legal Services Corporation (LSC) are facially unconstitutional. Appellants, a group of organizations and an individual involved in the provision of legal services to indigent persons, contend that the restrictions impose unconstitutional conditions on the exercise of their First Amendment rights and violate equal protection and due process rights protected by the United States Constitution. We affirm the judgment of the district court that the restrictions do not violate the First Amendment. We vacate and remand the judgment of the district court that the restrictions do not violate the constitutional rights of indigent persons because appellants fail to establish their standing to raise the rights of their clients.

I. BACKGROUND

In 1974, Congress enacted the Legal Services Corporation Act, 42 U.S.C. §§ 2996 *et seq.* The Act established the LSC as a private nonprofit corporation "for the purpose of providing financial support for legal assistance in noncriminal proceedings . . . to persons financially unable to afford legal assistance." § 2996b. The LSC receives funds annually from Congress and makes grants directly to local organizations that provide civil legal assistance to indigent persons. *See* LSC, 1994 Annual Report 1, 5. To obtain LSC funding, local organizations must submit applications describing the legal services they intend to provide with LSC funding. *See* 45 C.F.R. § 1634.3. In the initial Act creating

the LSC, Congress placed restrictions on local organizations who received grants from the LSC. For example, LSC funds could not be used by recipients to provide legal assistance in proceedings concerning abortion, desegregation, or military desertion. § 2996f(b)(8)-(10). With certain exceptions for funds received from tribal, "interest on lawyers trust account," and other non-federal sources, these restrictions applied even if the organization's activities were funded with non-LSC funds. *See* § 2996i(c); 45 C.F.R. pt. 1610 (1976); 41 Fed. Reg. 25,899, 25,901-02 (1976).

This case arises from recent enactments by Congress that place additional limitations on legal service organizations that accept LSC funds. In 1996, as a result of controversy over the activities pursued by some organizations receiving LSC funds, Congress expanded the number of limitations governing recipients of LSC funds. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, §§ 504, 508, 110 Stat. 1321, 1321-53 to -57, 1321-57 to -58 (1996 Budget Act). The 1996 Budget Act prohibited recipients of LSC funds from, among other things: 1) advocating or opposing the alteration of an elective district, § 504(a)(1); 2) influencing the issuance of any regulation by any Federal, State, or local agency, § 504(a)(2); 3) influencing any part of any agency adjudicatory proceeding if the proceeding concerns the formulation or modification of any policy of general applicability, § 504(a)(3); 4) influencing the passage or defeat of any legislation, § 504(a)(4); 5) participating in a class action suit, § 504(a)(7); 6) representing certain aliens, § 504(a)(11); 7) claiming or collecting attorneys' fees pursuant to laws requiring the award of such fees, § 504(a)(13); 8) participating in abortion litigation, § 504(a)(14); 9) participating in litigation on behalf of a prisoner, § 504(a)(15); 10) participating in efforts to reform a welfare

system, § 504(a)(16); and 11) defending a person in eviction proceedings if the person is involved in illegal drug activity, § 504(a)(17).[1] Congress reenacted these restrictions in the

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[1] Section 504 of the 1996 Budget Act states in pertinent part:

SEC. 504. (a) None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide Financial assistance to any person or entity (which may he referred to in this section as a "recipient")-

(1) that makes available any funds, personnel, or equipment for use in advocating or opposing any plan or proposal, or represents any party or participates in any other way in litigation, that is intended to or has the effect of altering, revising, or reapportioning a legislative, judicial, or elective district at any level of government . . . ;

(2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency;

(3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect;

(4) that attempts to influence the passage or defeat of any legislation, . . . initiative, or any similar procedure of the Congress or a State or local legislative body;

(5) that attempts to influence the conduct of oversight proceedings of the Corporation or any person or entity receiving financial assistance provided by the Corporation;

(6) that pays for any personal service, advertisement, telegram, telephone communication, letter, . . . or related expense, associated with an activity prohibited in this section;

(7) that initiates or participates in a class action suit;

. . . .

(11) that provides legal assistance for or on behalf of any alien, unless the alien is present in the United States and [meets certain specified exceptions];

(footnote continued...)

Appendix A

. . . .

(12) that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration, including the dissemination of information about such a policy or activity, except that this paragraph shall not be construed to prohibit the provision of training to an attorney or a paralegal to prepare the attorney or paralegal to provide-

(A) adequate legal assistance to eligible clients; or

(B) advice to any eligible client as to the legal rights of the client;

(13) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees;

(14) that participates in any litigation with respect to abortion;

(15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison;

(16) that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation;

(17) that defends a person in a proceeding to evict the person from a public housing project if,

(A) the person has been charged with the illegal sale or distribution of a controlled substance; and

(B) the eviction proceeding is brought by a public housing agency because the illegal drug activity of the person threatens the health or safety of another tenant . . . ;

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 502(a), 110 Stat. 3009, 3009-59 to -60 (1996).[2]

Enactment of these restrictions prompted the LSC to promulgate new regulations to ensure that recipients of LSC funding did not use funds received from the LSC to support prohibited activities. Under LSC regulations existing prior to the enactment of the 1996 Budget Act, funds held by organizations under the "control" of an organization receiving LSC funds were "subject to the same restrictions as if the funds were held by the recipient." Audit and Accounting Guide for Recipients and Auditors, 50 Fed. Reg. 49,276, 49,280 (1985). The LSC defined "control" as the ability to "[d]etermine the direction of management and policies" or "influence the management or policies" of another organization "to the extent that an arm's length transaction may not be achieved." *Id.* at 49,279. Under the LSC's initial implementation of the 1996 Budget Act, the restrictions enacted by Congress applied to any organization "interrelated," as determined by application of the "control" test, with a recipient of LSC funds. *See Legal Aid Soc'y of Hawaii v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1415 (D. Haw. 1997).

On January 9, 1997, appellants filed suit against the LSC in the United States District Court for the District of Hawaii challenging the facial constitutionality of the restrictions and implementing regulations. The plaintiffs consisted of five legal service organizations that receive a portion of their

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[2] Congress also reenacted the restrictions in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 502(a), 111 Stat. 2440, 2510-11 (1997).

funds from the LSC,[3] a group representing legal services clients,[4] two organizations that fund work by legal services organizations,[5] and two lawyers employed by legal services organizations.[6] They asserted that the restrictions imposed an unconstitutional condition on their First Amendment rights, and violated the equal protection and due process rights of their clients. Appellants requested a preliminary injunction to prevent the LSC from enforcing the restrictions.

On February 14, 1997, the district court granted in part and denied in part appellants' request for a preliminary injunction. The court concluded that the LSC's "interrelated organization" regulation did not provide a recipient of LSC funds with the ability to form an affiliate organization to pursue prohibited activities with non-LSC funds. *See id.* at 1416-17. The district court held that it was substantially likely that the restrictions placed an unconstitutional condition on appellants' First Amendment rights by conditioning the availability of LSC funds on the relinquishment of those rights. *See id.* at 1421. The district court enjoined numerous restrictions contained in the Acts. *See id.* at 1422.

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[3] Legal Aid Society of Hawaii, Legal Services of Northern California, Inc., San Fernando Valley Neighborhood Legal Services, Legal Aid Society of Orange County, and Alaska Legal Services Corporation.

[4] California State Client Council.

[5] The Hawaii Justice Foundation and The Impact Fund.

[6] Gary F. Smith and Lloyd Van De Car. The parties stipulated to the dismissal of Mr. Van De Car on appeal based on his discontinuation of employment with the Legal Aid Society of Hawaii.

In response to the district court's ruling, the LSC revised the regulations governing the ability of organizations who receive funds from the LSC, known as "recipients," to maintain relationships with organizations pursuing prohibited activities, organizations we will refer to as "unrestricted organizations." The final rule issued by the LSC "nullified" its prior policy on "interrelated organizations" and adopted "program integrity" regulations modeled on the regulations upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991). 62 Fed. Reg. 27,695, 27,695, 27,697-700 (1997). The new regulations mandate that a recipient of LSC funds maintain physical and financial separation from unrestricted organizations. *See* 45 C.F.R. § 1610.8. To determine if the organizations are separate, the LSC will examine certain factors, such as the existence of separate personnel and facilities. In addition, the unrestricted organization must be a legally separate entity. § 1610.8(a)(1).

After the issuance of the new regulations, the United States intervened in the district court to defend their constitutionality. In ruling on cross-motions for summary judgment filed by the parties, the district court concluded that *Rust* was dispositive on the constitutionality of the LSC requirement that a recipient have separate personnel and facilities from an unrestricted organization. See Legal Aid Soc'y of Hawaii v. Legal Servs. Corp., 981 F. Supp. 1288, 1294 (D. Haw. 1997). The court upheld the requirement that the unrestricted organization be a "legally separate entity," 45 C.F.R. § 1610.8(a)(1), which was not a part of the regulations challenged in *Rust*, because the requirement did not prevent appellants from exercising their constitutional rights, and the additional burden imposed by the separate incorporation requirement was insignificant. 981 F. Supp. at 1297. The district court rejected the due process and equal protection arguments presented by appellants. The court

granted the summary judgment motions of the LSC and the United States, and denied appellants' motion. The court also dissolved its earlier injunction.

This appeal followed.

II. STANDARD OF REVIEW

We review the grant of summary judgment de novo. *Everson v. United States*, 108 F.3d 234, 236 (9th Cir. 1997). The decision that a statute is constitutional is a question of law that is reviewed de novo. *United States v. Michael R.*, 90 F.3d 340, 343 (9th Cir. 1996).

III. DISCUSSION

We begin, as the Supreme Court did in *Rust*, by discussing the posture of this case. Appellants bring a *facial* challenge to the restrictions and therefore must satisfy a stringent standard:

> Petitioners face a heavy burden in seeking to have the regulations invalidated as facially unconstitutional. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid."

Rust, 500 U.S. at 183 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). It bears emphasizing that, under *Rust*, even if appellants presented a factual situation that suggested

the restrictions were unconstitutional in only limited circumstances (and we do not hold that they have presented such circumstances), we would not strike down the restrictions as unconstitutional.

A. The Unconstitutional Conditions Challenge

The United States Constitution vests Congress with the power to spend for the "general Welfare of the United States." Art. I, § 8, cl. 1. Congress has broad power to appropriate funds and define the limits of programs supported by public funds. *See South Dakota v. Dole*, 483 U.S. 203, 206-07 & n.2 (1987); *Rust*, 500 U.S. at 194.

Appellants' primary argument is that the restrictions imposed on those organizations who choose to receive LSC funds violate the First Amendment by prohibiting recipients from using non-LSC funds to engage in activities protected by the First Amendment, such as the right of legal services organizations and their attorneys to lobby legislators and administrators, *see California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 513, 515 (1972), or express their views on matters of public concern.[7] Appellants claim that the restrictions are unconstitutional because they condition the receipt of a benefit, in this case the grant of federal funds, on the relinquishment of the right to engage in protected activities. They claim this case fits within the Supreme Court's statement in *Perry v. Sindermann*, 408 U.S. 593 (1972), that "even though the government may deny [a] benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a

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[7] Appellees agree that a significant number of the restrictions implicate First Amendment rights.

benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Id.* at 597.

[1] Appellants' unconstitutional conditions argument is without merit because neither the congressional enactments nor the implementing regulations infringe on First Amendment rights. The regulations promulgated by the LSC to preserve the distinction between restricted and unrestricted organizations are nearly identical to the regulations upheld in *Rust* and there is no basis for distinguishing this case from *Rust*.

The regulations challenged in *Rust* governed implementation of the Title X program, which provided grants to projects offering family planning services. 500 U.S. at 178. However, Congress prohibited the use of Title X funds in any program where abortion was a method of family planning. To implement this restriction, the Secretary of the Department of Health and Human Services promulgated regulations to ensure that organizations offering Title X programs maintained a certain degree of separation between Title X programs and programs offering abortion services.

Three principal conditions were placed on grants awarded under Title X. *Id.* at 179. First, a Title X project could not provide counseling or referrals concerning abortion as a method of family planning. Second, the project could not encourage abortion as a method of family planning, including any lobbying effort or legal action to encourage abortion. Third, under the Secretary's "program integrity" regulations, Title X projects were required to have objective integrity and independence from prohibited activities. *Id.* at 180, 187.

Appendix A

The regulations at issue in *Rust* for determining "program integrity" stated:

> Maintenance of program integrity.
>
> A title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited [by statute and regulation] from inclusion in the title X program. In order to be physically and financially separate, a title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):
>
> (a) The existence of separate accounting records;
>
> (b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;
>
> (c) The existence of separate personnel;
>
> (d) The extent to which signs and other forms of identification of the title X project are present

and signs and material promoting abortion are absent.

42 C.F.R. § 59.9 (suspended 1993). The LSC regulations challenged in this case follow the *Rust* regulations closely:

> Program integrity of recipient.
>
> (a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:
>
> (1) The other organization is a legally separate entity;
>
> (2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities; and
>
> (3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:
>
> (i) The existence of separate personnel;

> (ii) The existence of separate accounting and timekeeping records;
>
> (iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and
>
> (iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.

45 C.F.R. § 1610.8(a). Given the similarity of the regulations, the Court's discussion in *Rust* of why the Secretary's regulations were constitutional controls the disposition of this case.

[2] In *Rust*, the Court rejected petitioners' reliance on an unconstitutional conditions argument because the government was not denying a benefit to anyone, but "instead simply insisting that public funds be spent for the purposes for which they were authorized." 500 U.S. at 196. As in *Rust*, the LSC regulations do not force a recipient to give up prohibited activities; "they merely require that the [recipient] keep such activities separate and distinct from [LSC] activities," *id.* If an organization wishes to engage in prohibited activities, it simply is required to conduct those activities through entities that are separate and independent from the organization that receives LSC funds.

Appellants correctly note that *Rust* distinguished between Title X "grantees," which were normally health-care organizations, and Title X "projects," which received funds under Title X for specific purposes. *Id.*; *see* Appellants'

Opening Br. at 35, 41-42. Under the *Rust* regulations, a "grantee" could continue to engage in prohibited activities if it complied with the Secretary's program integrity regulations. Appellants rely on a difference in terminology between the LSC and Title X regulations to argue that because the LSC regulations apply to "recipients," and not "projects," the regulations are unconstitutional. They find support for their argument in the Court's statement in *Rust* that characterized "unconstitutional conditions" cases as "situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." 500 U.S. at 197.

[3] However, appellants' reliance on the fact that the term "recipients" is employed in the LSC regulations instead of the term "projects" is misplaced. The proper constitutional test does not focus on the particular term used by the government agency, but whether the regulations "effectively prohibit [ ] the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Id.* The LSC regulations pass this test.

[4] First, the *Rust* regulations required that a project supported by Title X funds maintain the same degree of separation from an organization engaging in abortion activities as a recipient of LSC funds must maintain from an unrestricted organization, with the exception that the LSC requires that the unrestricted organization be a "legally separate entity," 45 C.F.R. § 1610.8(a)(1). A recipient of LSC funds may engage in conduct protected by the First Amendment outside the scope of the federally funded program if, as in *Rust*, the recipient sets up a separate entity that complies with the program integrity regulations.

Second, the LSC regulations are consistent with the two cases the Court discussed in *Rust* as standing for the proposition that Congress could not entirely prohibit certain constitutionally protected conduct outside the scope of a federally funded program. In *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983), the Court rejected the argument that a federal statute prohibiting lobbying by organizations who qualified for tax-exempt status under 26 U.S.C. § 501(c)(3) imposed an unconstitutional condition on the receipt of tax-deductible contributions. The Court noted that the prohibition represented a legislative choice to prevent subsidized lobbying with public funds. Under the statute, petitioners could continue lobbying by forming a nonlobbying organization qualified for the tax benefits of § 501(c)(3) and a separate lobbying organization under a less favorable provision of the Internal Revenue Code. However, if the petitioners pursued this option, they "would . . . have to ensure that the § 501(c)(3) organization did not subsidize" the unrestricted organization. *Regan*, 461 U.S. at 544. Moreover, the two organizations would have to be "separately incorporated." *Id.* at 544 n.6.

In *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984), the Court held that a federal law prohibiting noncommercial television and radio stations from "engag[ing] in editorializing" if they received federal grants violated the First Amendment. *Id.* at 366, 402. The stations were "barred absolutely from all editorializing" because the stations were not able to "segregate [their] activities according to the source of [their] funding" and thus had "no way of limiting the use of [their] federal funds to all noneditorializing activities." *Id.* at 400. The stations were "barred from using even wholly private funds to finance [their] editorial activity." *Id.* However, the Court recognized

that if Congress permitted the stations to "establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid under the reasoning of [*Regan*]." *League of Women Voters*, 468 U.S. at 400.

The LSC regulations are consistent with the decisions in *Regan* and *League of Women Voters*. The regulations simply require that if a recipient wishes to engage in prohibited activities, it must establish an organization separate from the recipient in order to ensure that federal funds are not spent on prohibited activities. Or, as the Court stated in *Rust*:

> By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in *League of Women Voters* and *Regan*, not denied it the right to engage in abortion- related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.

Rust, 500 U.S. at 198. In sum, there is no force to the argument that the use of term "recipients" in the LSC regulations instead of the term "projects" requires us to find the regulations unconstitutional.

Appellants contend that our reliance on *Rust* is too simplistic because it ignores the hardship imposed on recipients by the LSC regulations. To support this point, appellants speculate as to how the LSC will apply the regulations. They assert that the "LSC's regulations allow

'affiliated' organizations to conduct restricted activities only in the limited sense of permitting overlapping boards of directors." Appellants' Opening Br. at 42-43. They interpret the regulations as prohibiting "any sharing of staff or facilities." *Id.* at 45. According to appellants, these regulations greatly increase the difficulty of providing legal services. Moreover, appellants contend that engaging in restricted activities will be a financial impossibility in some cases because of the expense of hiring two lawyers to serve rural areas, such as remote regions of Alaska, or the expense of maintaining separate facilities.

[5] We disagree. We need only briefly discuss appellants' allegations because they fail to explain why we should declare the regulations unconstitutional in the context of a facial challenge even if we found merit in certain specific factual allegations. "Invalidating any rule on the basis of its hypothetical application to situations not before the Court is 'strong medicine' to be applied 'sparingly and only as a last resort.'" *FCC v. Pacifica Foundation*, 438 U.S. 726, 743 (1978) (opinion of Stevens, J.) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Appellants do not present substantial evidence to support their assertions concerning how the LSC regulations will be interpreted and applied to recipients, and the text of the regulations does not support their categorical arguments.

[6] For example, the program integrity regulations do not state that the organizations are limited to overlapping boards of directors, or that no sharing of staff is permissible. Instead, the regulations state that no factor is determinative and the LSC will make a case-by-case determination. We do not know under what circumstances the LSC will permit a person to work part-time at a recipient organization and part-time at an unrestricted organization. Indeed, there is evidence

in the record that the LSC granted permission for an attorney to work part-time at a LSC recipient and also engage in prohibited activities on a part-time basis. *See* Supplemental Excerpts of R. at 34-35 (affidavit of LSC's General Counsel discussing approval of attorney continuing to serve as counsel in a class action after modifying his schedule to work part-time for a LSC recipient).

[7] Presumably, the restrictions make it more difficult for organizations to engage in prohibited activities. However, similar restrictions in *Rust* required that an organization engaging in abortion activities "conduct those activities through programs that are separate and independent from the project that receives Title X funds." 500 U.S. at 196. The Court did not find it constitutionally significant that the restrictions required the recipient of Title X funds to expend effort to comply with the restrictions. Similarly, the fact that the LSC restrictions may require additional compliance efforts by a recipient if it wishes to engage in prohibited activities furnishes no basis for departing from *Rust*.

[8] Moreover, we do not find it significant that the LSC regulations require that the unrestricted organization be a "legally separate entity." 45 C.F.R. § 1610.8(a)(1). *Regan* approved of this specific requirement when it noted that an organization that wanted to engage in prohibited lobbying activities would have to be "separately incorporated" from the organization receiving a more favorable tax subsidy. 461 U.S. at 544 n.6. We agree with the district court that the combination of the separate incorporation requirement approved in *Regan* and the program integrity requirements approved in *Rust* "does not create an unconstitutional burden on [appellants'] exercise of their constitutional rights." 981 F. Supp. at 1297. As the district court observed, legal services organizations have significant access to legal

counsel, and appellants fail to demonstrate how the requirement of filing incorporation papers for an unrestricted organization imposes any significant burden. *See id. Rust* does not suggest that the Title X regulations are the maximum permissible separation requirements that the government can impose and we decline to find that the minor additional requirement present in this case has constitutional significance.

[9] Appellants also attempt to distinguish *Rust* on the grounds that *Rust* involved a government program that "used private speakers to transmit specific information pertaining to its own program," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). Appellants rely on *Rosenberger* to support their claim that the LSC is a program designed to encourage private speech and therefore the restrictions are subject to heightened scrutiny. This analogy to *Rosenberger* is not persuasive. The government in *Rosenberger* "expend[ed] funds to encourage a diversity of views from private speakers," *id.* at 834, unlike the LSC program where "the government [has] appropriate[d] public funds to promote a particular policy of its own," *id.* at 833. Like the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas.

Appellants also seek to escape *Rust* by engrafting a threshold compelling interest test onto *Rust*. They assert that the government may not place restrictions "on the use of non-LSC funds to support activities protected by the First Amendment" without a compelling interest. Appellants' Opening Br. at 26. According to appellants, our inquiry into the existence of alternative methods for organizations to engage in prohibited activities is not proper until the

government establishes a "compelling need for the restriction." *Id.* at 27. It is true that a recipient of LSC funds may not engage in prohibited activities, even if those activities are funded from a non-LSC source, unless it complies with the program integrity regulations. However, a similar argument was rejected in *Rust*.

In *Rust*, petitioners argued that the regulations penalized privately funded speech because Title X required grant recipients to contribute funding from other sources to the financing of Title X activities. 500 U.S. at 199 n.5; *see* Appellants' Opening Br. at 33-34. We reject appellants' argument for the same reasons *Rust* rejected the petitioners' argument.

[10] First, a recipient is not compelled to accept a subsidy from the LSC. A recipient can decline the federal subsidy and avoid being subject to the restrictions. See *Rust*, 500 U.S. at 199 n.5; *Grove City College v. Bell*, 465 U.S. 555, 575 (1984) (conditioning federal assistance on compliance with a federal program does not violate petitioner's First Amendment rights because the recipient "may terminate its participation in the [program] and thus avoid the requirements of [the program]"). By choosing to accept LSC funds, "a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income," *Rust*, 500 U.S. at 199 n.5. Second, the LSC regulations only govern recipients of LSC funds and any related entities that fail to satisfy the program integrity requirements. If the recipient wishes to engage in prohibited activities, it remains free to use private funds to finance these activities if it complies with the separation requirements of § 1610.8.

[11] Third, the Supreme Court did not apply a compelling interest test in *Rust*. Appellants argue that the Court in *Rust*

upheld the regulations because they were a "direct response" to the "observation[ ]" in a General Accounting Office report that the public "can get the impression" that federal funds are supporting abortion activities, 500 U.S. at 188. *See* Appellants' Opening Br. at 29. This is incorrect. Appellants fail to explain the complete absence of any reference to a compelling interest test in *Rust* or any mention by the Court that the regulations were valid because there was a compelling interest in correcting a public misimpression. Indeed, appellants admit that the Court did not refer to "strict scrutiny" in *Regan, League of Women Voters*, or *Rust*. Appellants' Opening Br. at 31 n.21. At most, it appears that the Court applied heightened scrutiny in *League of Women Voters* because, unlike *Rust* and this case, the restrictions did not permit the formation of separate affiliates. In sum, appellants' threshold strict scrutiny test simply does not exist.

Finally, appellants claim that the restrictions violate the First Amendment rights of full-time legal services lawyers. In a footnote in their Opening Brief, they suggest that the regulations are unconstitutional because full-time legal services lawyers are barred from engaging in the outside practice of law. Thus, they argue, full-time lawyers may not pursue prohibited activities on their own time, unlike the doctors in *Rust*, who could pursue abortion-related activities when they were not working for the Title X project. 500 U.S. at 198. Even if we were to assume that it is sufficient to raise an argument by placing it in a footnote on page forty-six of an opening brief, we would reject the argument.

[12] It is true that longstanding LSC regulations generally prohibit the outside practice of law. *See* 45 C.F.R. pt. 1604 (1976). The purpose of this provision, which is common in government agencies, is to ensure that outside demands "do

not hinder fulfillment of the attorney's overriding responsibility to serve those eligible for assistance under the Act." 45 C.F.R. § 1604.1. According to the LSC, the provision is essential to insure that a legal services lawyer does not compete with lawyers in private practice, is not burdened by excessive court appointments," and does not accept other commitments that might interfere with rendering quality full-time legal assistance to eligible clients. 41 Fed. Reg. 18,511, 18,512 (1976). Like the restrictions on doctors in *Rust*, the restrictions on a LSC-funded attorney are a consequence of that attorney's decision to accept full-time employment with a LSC funded organization. If an attorney wishes to engage in prohibited activities, the attorney could work part-time at an unrestricted organization in certain circumstances or engage on his own time in restricted activities that do not involve the outside practice of law, such as lobbying. Appellants' unsupported assertion that the restriction on sharing of personnel precludes working part-time at an unrestricted organization is contradicted by the record. *See* Supplemental Excerpts of R. at 34-35 (allowing attorney to convert full-time employment with a LSC recipient to part-time employment and permitting his participation in prohibited activities outside of his work for the LSC recipient). Appellants' argument is without support and we reject it.

B. Equal Protection and Due Process

Appellants argue that the restrictions violate the Fifth Amendment rights of legal services clients "to obtain fair and equal access to the courts." Appellants' Opening Br. at 49. They claim that the restrictions violate the Due Process Clause by interfering with the client's right to retain a lawyer of his or her choice and the client's right to engage in meaningful advocacy. They also raise an equal protection

challenge because, according to appellants, the restrictions deny clients "equal access to the courts based on their indigence and the causes they wish to espouse." *Id.* at 53.

Appellees argue that appellants lack standing to assert the rights of clients of legal services organizations, and, in any event, the claims are meritless. The district court held that appellant CSCC had standing, but rejected appellants' claims on the merits.

Prior to the recent decision of the Supreme Court in *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), we may have found it easier to avoid the issue of standing by assuming jurisdiction and proceeding to the merits under the doctrine of "hypothetical jurisdiction." Under this doctrine, a court will assume jurisdiction and decide the merits if the merits are "more readily resolved" and "the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Id.* at 1012; *see United States v. Troescher*, 99 F.3d 933, 934 n.1 (9th Cir. 1996); *Clow v. U.S. Dep't of Housing and Urban Dev.*, 948 F.2d 614, 616 n.2 (9th Cir. 1991). The Supreme Court rejected this doctrine "because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Steel Co.*, 118 S. Ct. at 1012. Thus, we must "spend our time and energy puzzling over the correct answer to an intractable jurisdictional matter," *id.* at 1021 (Breyer, J., concurring), even if we think that the substantive merits are easily disposed of by well-settled law.

[13] The "irreducible constitutional minimum of standing" contains three requirements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, there must be an "injury in fact." The "injury in fact" must be the invasion of

a legally protected interest which is "concrete and particularized," *id.*, and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)). Second, there must be causation—"a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Steel Co.*, 118 S. Ct. at 1016-17. Third, there must be redressability—"a likelihood that the requested relief will redress the alleged injury." *Id.* at 1017.

Appellants asserted below that indigent clients of legal service organizations are parties to this action through the California State Client Council (CSCC). 981 F. Supp. at 1299. CSCC "is an unincorporated association whose members are indigent clients of legal services programs who also sit on the boards of those programs." Compl. ¶ 40. The purpose of CSCC is to "meet and discuss issues of concern to the community of impoverished legal services organization clients, to develop policies of assistance in alleviating their adverse conditions, to work with legal services programs to ensure that those programs meet the needs of their clients, and to encourage leadership activities" of low-income clients, *Id.* ¶ 41.

The district court found that CSCC had suffered an "injury in fact." The court relied on an affidavit submitted by the Chair of the CSCC stating that CSCC's "own organizational efforts have been adversely affected by LSC restrictions . . . [because] [t]he new LSC restrictions have prevented some legal services programs . . . from using non-LSC money to provide assistance" for CSCC's efforts to assist low-income clients. Declaration of Lucinda Horne ¶ 8 attached to Pls.' Mot. for Prelim. Inj.; *see* 981 F. Supp. at 1299. Thus, relying on *Havens Realty Corp. v. Coleman*, 455

U.S. 363 (1982), the court concluded that CSCC established an injury and "has standing to challenge the restrictions on behalf of the clients." 981 F. Supp. at 1299.

[14] The district court erred. The district court conflated the question of whether CSCC has standing to press claims for injury on its own behalf with the question of whether CSCC has representative standing to assert claims *on behalf of its members*. CSCC may have standing on its own behalf to assert a claim that the LSC restrictions resulted in a concrete injury to the CSCC. But we need not decide that issue because CSCC does not argue that the restrictions violate the rights of the organization. Instead, CSCC seeks representative standing to press the claim that the restrictions violate the equal protection and due process rights of its members.

[15] The district court erred in basing its conclusion on an affidavit claiming that CSCC *as an organization* suffered an adverse impact from the restrictions. This conclusion was contrary to the requirements for establishing representative standing. "An association has standing to sue or defend in such capacity . . . only if its members would have standing in their own right." *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1068 (1997). As the United States points out, *see* Br. at 37, and appellants fail to respond to, *see* Reply Br. at 26, "there is nothing in the record to suggest that any individual member of the CSCC has standing." United States Br. at 37.

[16] Instead, appellants argue that "numerous declarations" allege that the restrictions have denied unnamed indigent persons the opportunity to pursue claims. Reply Br. at 26. However, the "injury in fact" test "'requires that the party seeking review be himself among the injured.'"

Lujan, 504 U.S. at 563 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972)). To survive a summary judgment motion, appellants "had to submit affidavits or other evidence showing, through specific facts, . . . that *one or more of [their] members* would [be] 'directly' affected apart from their 'special interest' in th[e] subject," *Lujan*, 504 U.S. at 563 (quoting *Sierra Club*, 405 U.S. at 735, 739) (emphasis added). Appellants do not point us to any evidence in the record establishing that these unnamed clients of legal services organizations are members of the CSCC or exactly how these clients satisfy the standing requirements so that we may scrutinize the affidavits of these members. *See Lujan*, 504 U.S. at 563-64 (discussing specific allegations contained in affidavits of members of environmental organization to determine if standing exists). Thus, CSCC fails to establish that it has standing to assert the rights of its members.

The district court's reliance on *Havens Realty* was misplaced. *Havens Realty* held that an organization had standing in its own right because the organization established that the racial steering practices of the petitioner caused a drain on that organization's resources. *See* 455 U.S. at 379. The organization did not seek to assert the rights of its members, *id.* at 378, and thus *Havens Realty* provides no support for concluding that CSCC has representative standing because there is a possible injury to the organization.

[17] Appellants do not present any other theory of standing beyond their reliance on the presence of CSCC in this suit. A generous reading of their brief discussion of standing in their Reply Brief may suggest by implication that they seek third party standing to assert the rights of their clients even though they do not cite any relevant authority for this proposition, make no express argument, and fail to establish how they meet the requirements for third party

standing.[8] Because appellants do not raise the issue of third party standing on appeal and do not demonstrate that they satisfy the requirements for third party standing, *see Powers v. Ohio*, 499 U.S. 400, 410-11 (1991), we decline to allow third party standing in this case. We note that the Supreme Court has "recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied." *Id.* The requirements to establish third party

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8 The record discloses that they mentioned below in the reply to their motion for summary judgment that third party standing might exist. The district court stated in a footnote that "attorneys have third-party standing to assert the constitutional rights of their clients." *Legal Aid Soc'y of Hawaii v. Legal Servs. Corp.*, 981 F. Supp. 1288, 1299 n.16 (D. Haw. 1997). On appeal, appellants do not mention this possible method of establishing standing and we note that the district court's broad statement is true only in specific, limited circumstances. *See, e.g., Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (listing requirements for third party standing); *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) (noting "fundamental restriction" that party assert own rights admits of limited exceptions and listing requirements for exceptions to apply).

standing include "injury in fact," a close relation to the third party, and "some hindrance to the third party's ability to protect his or her own interests." *Id.* at 411. Appellants make no showing that the clients are unable to assert their own interests.

IV. CONCLUSION

We AFFIRM the district court's judgment that the LSC restrictions do not violate appellants' First Amendment rights. We VACATE the district court's judgment that the LSC restrictions do not violate the due process and equal protection rights of indigent persons and REMAND the case with instructions to dismiss the complaint insofar as it asserts the rights of indigent persons because appellants have no standing to raise these issues.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 97-00032 ACK

LEGAL AID SOCIETY OF HAWAII, et al.

Plaintiffs,

vs.

LEGAL SERVICES CORPORATION

Defendant.

ORDER GRANTING THE LSC'S AND DOJ'S MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED AUGUST 1, 1997

SUMMARY

Plaintiffs essentially prevailed at the preliminary injunction stage because this Court ruled that the LSC regulations violated the unconstitutional conditions doctrine. Legal Aid Society of Hawaii v. Legal Services Corporation, 961 F. Supp. 1402, 1420 (D. Haw. 1997). Importantly, LSC regulations prohibiting lobbying for welfare reform were enjoined so that lobbying was allowed during the past critical legislative session during which the Federal government was turning over to the states much of the welfare function.

Appendix B

In seeking a preliminary injunction, Plaintiffs asserted that the ruling of the Supreme Court in Rust regarding adequate alternate channels for speech was dispositive. This Court concurred, and the LSC has subsequently amended its regulations in basic compliance with Rust. Seemingly, Plaintiffs had achieved their primary objectives in this suit. However, Plaintiffs now contend that Rust is not controlling and in any event the LSC has not conformed to the regulations in Rust. Plaintiffs also raise additional arguments.

With regard to the motions before the Court, the Court grants LSC and DOJ's motion for summary judgment and denies Plaintiffs' motion for summary judgment. For the same reasons, the Court dissolves its earlier injunction, which additionally is moot because it is based on superseded regulations that no longer affect the parties.

The Court reads the new regulations as allowing a LSC funded organization to control another organization that engages in restricted activities so long as all the insularity and separate incorporation requirements of the regulations are satisfied. With this ability to control the separately incorporated and insular second organization, the Court finds that alternative channels exist for LSC-funded organizations to exercise their constitutionally protected rights such as lobbying the legislature. Thus, the LSC-funded legal aid societies will be able to control affiliates who care for the needs of the poor in areas from which the regulations restrict the societies.

The insularity requirements have already been upheld in Rust and the Court finds Plaintiffs' many efforts to distinguish the case unpersuasive. Unlike Rust, however, the regulations here also require that an affiliate be separately incorporated. Nevertheless, the Court does not find that the

separate incorporation requirement limits the availability of alternate channels any more than the insularity requirement alone did in Rust. Accordingly, the addition of the separate incorporation requirement does not make these regulations unconstitutional. Moreover, the Court finds the LSC regulations are just as narrowly tailored as the regulations in Rust and that their burdens do not exceed those in Rust; except as to the separate incorporation requirement, which the Court finds to be de minimis and which was allowed in TWR. The Supreme Court ruled in TWR that the separate incorporation requirement was "not unduly burdensome."

The Court also finds that these regulations do not violate Plaintiffs' Due Process or Equal Protection rights.

FACTUAL BACKGROUND

On February 14, 1997, this Court granted in part Plaintiffs'[1] motion for a preliminary injunction (hereinafter "order"). See Legal Aid Society of Hawaii v. Legal Services Corporation, 961 F. Supp. 1402 (1997). A general background of this case can be found in that order. Id. at 1406-07.

On March 3, 1997, Plaintiffs filed a motion for reconsideration of the Court's order. The Legal Services

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[1] As stated in its initial order, the term Plaintiffs as used in this case refers to ten different parties: (1) the Legal Aid Society of Hawaii ("LASH"), (2) Legal Services of Northern California ("LSNC"), (3) San Fernando Valley Neighborhood Legal Services ("SFNLVS"), (4) Legal Aid Society of Orange County ("LASOC"), (5) Alaska Legal Services Corporation, (6) California State Client Council ("CSCC"), (7) Hawaii Justice Foundation, (8) The Impact Fund, (9) Lloyd Van De Car, and (10) Gary F. Smith.

Corporation ("LSC") filed an opposition to the motion for reconsideration on March 14, 1997. In their opposition, the LSC attached as an exhibit an amended regulation concerning the use of Non-LSC funds, 62 Fed. Reg. 12101. See LSC's opposition, Appendix A. The interim regulation added language modeled after the restrictions upheld by the Supreme Court in Rust v. Sullivan, 500 U.S. 173 (1991). On April 9, 1997, in response to this amendment, the Court sua sponte issued an order to show cause whether the provision (62 Fed. Reg. 12101) moots Plaintiffs' reconsideration motion. On May 21, 1997, the LSC issued the final regulation which deviated significantly from the interim rule. See 62 Fed. Reg. 27696.

On April 14, 1997, Magistrate Kurren held a pretrial conference. At the conference, the government (hereinafter the "DOJ") was allowed to intervene via stipulation by the parties. In addition, the Plaintiffs agreed to withdraw their reconsideration motion. Magistrate Kurren also set the instant hearing date and briefing schedule.

In accordance with the schedule, the DOJ and LSC both filed motions for summary judgment on May 23, 1997. The Plaintiffs filed an opposition and a counter-motion for summary judgment on June 20, 1997. On July 3, 1997, the LSC and the DOJ filed their oppositions. On July 17, 1997, the Plaintiffs filed their reply. On July 28, 1997, the Court held a hearing.

STANDARD OF REVIEW

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.P. 56(c). One of the principal purposes of the summary judgment

procedure is to identify and dispose of factually unsupported claims and defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

The United States Supreme Court has declared that summary judgment must be granted against a party who fails to demonstrate facts to establish an element essential to his case where that party will bear the burden of proof of that essential element at trial. Celotex, 477 U.S. at 322. "If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact [citations omitted], the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment." T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

Rather, Rule 56(e) requires that the nonmoving party set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial. T.W. Elec. Serv., 809 F.2d at 630. At least some "significant probative evidence tending to support the complaint" must be produced. Id. Legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. See Eisenberg v. Ins. Co. of North America, 815 F.2d 1285, 1289 (9th Cir. 1987) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)). Thus, the question is whether

"reasonable minds could differ as to the import of the evidence." Anderson, 477 U.S. at 250-51.

The Ninth Circuit has established that "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987). Moreover, the United States Supreme Court has stated that "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

Indeed, "if the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." Franciscan Ceramics, 818 F.2d at 1468 (emphasis in original) (citing Matsushita, 475 U.S. at 587). The Ninth Circuit, however, has held that courts should not determine whether direct evidence (as opposed to circumstantial evidence) is implausible because to do so would be to weigh the evidence. McLaughlin v. Liu, 849 F.2d 1205, 1207 (9th Cir. 1988). Moreover, all evidence and inferences to be drawn therefrom must be construed in the light most favorable to the nonmoving party. T.W. Elec. Serv., 809 F.2d at 630-31.

Appendix B

DISCUSSION

I. The Issue Before the Court

On February 14, 1997, after reviewing the relevant case law,[2] this Court issued a 42 page order enjoining the enforcement of numerous LSC restrictions because they placed an unconstitutional condition on the legal aid organizations. The crux of the Court's decision was that the LSC's inter-related organization provision did not provide a legal aid organization alternate channels in which to exercise certain First Amendment rights.[3]

The LSC has since made significant modifications to its inter-related provision.[4] The question before the Court today

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[2] For purposes of the preliminary injunction, the parties and the Court all agreed that Regan v. TWR, 461 U.S. 540 (1983) ("TWR"), FCC v. League of Women Voters, 468 U.S. 364 (1984) ("League"), and Rust v. Sullivan, 500 U.S. 173 (1991) ("Rust") controlled the query of whether the LSC restrictions constituted an "unconstitutional condition."

[3] Plaintiffs now argue that the Court should apply a least restrictive alternative option in deciding this motion. The Court, however, finds the least restrictive alternative analysis inapplicable because it finds that Plaintiffs' constitutional rights are not infringed. The Court finds that Plaintiffs' constitutional rights are not infringed because Plaintiffs have ample alternative channels in which to exercise their constitutionally protected activities. In any event, if the least restrictive analysis applies, the Court finds that the LSC regulations are as narrowly tailored in Rust and the burdens do not exceed those upheld in Rust.

[4] The relevant regulation states:

> (a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:

(footnote continued...)

is whether it should invalidate the new regulations because they do not cure the constitutional defects that led to the issuance of the first injunction. To that question, the Court now turns.

Whether the new regulations pass constitutional muster depends on the resolution of the following issue:

> does a legal aid organization's ability to control a separate legal organization with separate personnel and facilities provide an alternative

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(1) The other organization is a legally separate entity;
(2) The existence of separate accounting and timekeeping records;
(3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more facts will not be determinative. Factors relevant to this determination shall include but will not be limited to:
(i) The existence of separate personnel;
(ii) The existence of separate accounting and timekeeping records;
(iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and
(iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.
(b) Each recipient's governing body must certify to the Corporation within 180 days of the effective date of this part that the recipient is in compliance with the requirements of this section. Thereafter, the recipient's governing body must certify such compliance to the Corporation on an annual basis.

> channel for the exercise of the first legal aid organization's constitutional rights as required by the unconstitutional conditions doctrine.[5]

For reasons to be explained, the Court answers this question in the affirmative and thereby DENIES Plaintiffs' motion for summary judgment. The Court also finds that Plaintiffs' have not created a material issue of fact concerning the constitutional viability of the regulations. Accordingly, the Court GRANTS the LSC and DOJ's motion for summary judgment.

II. The New Regulations

The new regulations place two general requirements on the ability of legal aid organizations to create "alternate channels." The first is that the second organization must have

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[5] As evident, this opinion will focus primarily on the legal aid organization's constitutional rights that provided the basis for the injunction. In the motion for preliminary injunction, however, Plaintiffs also argued that the regulations placed an unconstitutional condition on the legal aid attorneys. Plaintiffs re-raised this argument in their briefs but did not argue it at the hearing. After careful review, however, the Court finds this argument without merit. As the Supreme Court noted in Rust: "The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority." Rust, 500 U.S. at 199. Here, the LSC funded attorney cannot engage in certain restricted activities but that is a consequence of accepting full-time employment with a LSC funded organization. The LSC funded attorney can choose to work elsewhere or he can work part-time for the LSC funded organization and part-time for another organization that engages in restricted activities. Thus like the doctors in Rust, the lawyers "remain free, however, to pursue . . . [restricted activities] when they are not acting under the auspices of the . . . [federally funded] project." Id. at 198.

separate personnel and facilities from the first organization. The Court will refer to these requirements under the rubric of "insularity." The second requirement is that the second organization must be a "legally separate entity." See 45 C.F.R. § 1610.8.

The factors behind the "insularity" requirement were modeled after the regulations upheld by the Supreme Court in Rust.[6] Therefore, because Rust may have already resolved

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[6] Compare the insularity regulation at issue here:

> (3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more facts will not be determinative. Factors relevant to this determination shall include but will not be limited to:
> (i) The existence of separate personnel;
> (ii) The existence of separate accounting and timekeeping records;
> (iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and
> (iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.

with the insularity regulations at issue in Rust:

> A title x project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act and § 59.8 and § 59.10 of these regulations from inclusion in the title X program. In order to be physically and financially separate, a title X project must have objective

(footnote continued...)

many of the issues before the Court today, the parties correctly focus on the applicability of Rust.

Needless to say, the LSC clearly believes that Rust should control this Court's decision. See 62 Fed. Reg. 27697 (stating that the inter-related provision was "fashioned after the program integrity standard found to be constitutional in Rust v. Sullivan by the Supreme Court, see 500 U.S. 173 (1991).") On the other hand, Plaintiffs argue that Rust does not apply because: (1) the facts of this case are much different than those at issue in Rust; and (2) the regulations in Rust distinguished between a project and a recipient whereas these regulations do not.

1. The Court rejects Plaintiffs' efforts to distinguish this case from Rust

At the outset, it should be noted that the Plaintiffs argued rather vehemently in the motion for a preliminary injunction

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integrity and independence from prohibited activities. Mere bookkeeping separation of title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):
(a) The existence of separate accounting records;
(b) The degree of separation from facilities (e.g. treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;
(c) The existence of separate personnel;
(d) The extent to which signs and other forms of identification of the title X project are present and signs and material promoting abortion are absent.

See 42 C.F.R. § 59-9 "Maintenance of program integrity.

that Rust applied to this case. The LSC (and the Court) agreed. Now that the LSC has attempted to comply with the dictates in Rust, however, the Plaintiffs argue that Rust does not apply.

Plaintiffs first argue that the Supreme Court upheld the insularity requirement in Rust because a separate bookkeeping requirement was impossible. According to the Plaintiffs, a separate bookkeeping requirement in Rust was impossible because "the doctor-patient interaction is not so easily categorized." See Plaintiffs' motion for summary judgment, pg. 16.

The Court rejects this argument. It is no more difficult for a doctor to categorize his conversation with a patient than it is for a lawyer to do so with his client. Both professions engage in confidential communication involving a wide (and often unforeseeable) range of topics. As the LSC points out, moreover, doctors are routinely required by government entities and insurers to categorize their activities. See e.g. 42 C.F.R. § 415.60(g) (1) (requiring timekeeping by doctors under Medicare). Thus, the fact that the insularity restrictions affect lawyers as opposed to doctors is of no consequence and the holding in Rust still applies.

Plaintiffs also argue that unlike Title X (the program at issue in Rust), the LSC is not "designed 'to a convey a governmental message.'" See Plaintiffs' Motion for Summary Judgment, pg. 18. The Court likewise finds this argument unpersuasive. Congress does not control the analysis and advice of either a Title X doctor or a LSC lawyer except for prohibiting advice in certain areas such as abortion. See Rust, 500 U.S. 173 (1991) ("The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program. In these circumstances, the general rule

that the Government may choose not to subsidize speech applies with full force.")

Plaintiffs also argue that this case differs from Rust because it involves litigation -- a traditional sphere of expression -- whereas Rust did not. See Plaintiffs' Motion for Summary Judgment, pg. 21 ("The sphere of litigation, like that of a university, 'is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the . . . First Amendment.", quoting, Rust, 500 U.S. at 200.) In making this argument, Plaintiffs misconstrue the language in Rust. The Court in Rust did not state that "the Government's ability to control speech within" a traditional sphere of expression violates the First Amendment per se. Instead, the Court held that government's forays into the traditional spheres are "restricted **by the vagueness and overbreadth** doctrines of the First Amendment." See Rust, 500 U.S. at 200. Here, however, Plaintiffs have not alleged that the restrictions are vague or overbroad. Thus, even assuming that litigation is a traditional sphere of expression, the language relied upon by the Plaintiffs does not distinguish this case from Rust.

As evident, Plaintiffs' efforts to distinguish Rust fail because as Plaintiffs argued in their motion for preliminary injunction, Rust is one of the major Supreme Court pronouncements on the doctrine of unconstitutional conditions and is highly relevant to this case.

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Concluding that Rust applies, the Court finds it dispositive on the constitutionality of an insularity requirement.[7] Thus, if the LSC restrictions simply required separate personnel and facilities, under Rust that would be constitutionally permissible.

III. The Regulations at issue here do limit the availability of alternate channels more than the regulations in Rust did, but still are constitutionally permissible

As Plaintiffs argue, however, the regulations at issue here go further than the ones in Rust because they require that the alternative organization be a "legally separate entity." See 62 Fed. Reg. 27700. As such, the regulations here narrow the availability of alternative channels more than the ones in Rust, albeit to a de minimis extent.[8]

For instance, as the Court noted in its initial order, example 5 of the regulations in Rust stated that:

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[7] In upholding an insularity requirement, the Court in Rust found that a:

> Title X grantee c[ould] continue to perform abortions, provide abortion related services, and engage in abortion advocacy; it simply [wa]s required to conduct those activities through programs that are separate and independent from the project that receives funds.

Rust, 500 U.S. at 196. This reasoning applies here.

[8] In some respects, however, the regulations in Rust are more stringent than those at issue here. A Title X project could not even "provide referral for abortion as a method of family planning." See Rust, 500 U.S. at 179. Here, LSC organizations are free to refer clients to any organization for any reason.

Appendix B

> An organization that operates a title X project engages in lobbying to increase the legal availability of abortion as a method of family planning. The project itself engages in no such activities and the facilities and funds of the project are kept separate from prohibited activities. The project is not in violation of paragraph (a) (1) of this section.

See 42 C.F.R. § 59-10(b) (5). Under the instant regulations, however, an organization could not engage in any restricted activities regardless if "the facilities and funds of the project" were kept separate unless the various projects were separate legal entities. Thus, as the Plaintiffs have argued, the regulations in Rust distinguish between projects whereas the instant regulations distinguish between recipients. See Plaintiffs' motion for summary judgment, pg. 10. The issue is whether this distinction is constitutionally significant.

1. **Plaintiffs' arguments, however, do not focus on how the regulations differ from Rust (i.e., the recipient/project distinction) but on the similarities with Rust, (i.e., the insularity requirement)**

The only distinction between focusing on recipients rather than projects is that the recipient requirement requires the entity engaging in restricted activities be separately incorporated. After all, in Rust, the projects still had to have separate personnel and facilities. Yet, rather than focus on the burden of the separate incorporation requirement, Plaintiffs still focus on the burden of the insularity

requirement despite the Supreme Court's imprimatur on such requirements in Rust.[9]

Plaintiffs argue that alternate channels are obtainable only with some difficulty. See e.g. Declaration of Victor Geminiani, Executive Director of LASH, ¶ 16 ("The restriction against **shared space** would be prohibitively expensive to implement")[10]; Declaration of Roberta Ranstrom, Executive Director of LSNC, ¶ 2 ("Complying with Final Rule 45 C.F.R. Part 1610, particularly the requirements of **maintaining separate staff and facilities** to handle restricted activities, would impose extreme burdens on LSNC."); Declaration of Neal S. Dudovitz, Executive Director of SFVLNS, ¶ 5 ("To create a second organization that could receive non-LSC funds and remain sufficiently

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[9] In particular, the Supreme Court in Rust has stated that:

> By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in League of Women Voters and Regan, not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.

500 U.S. at 198.

[10] See also Geminiani Declaration ¶ 14 ("As a practical matter, the new regulation would effectively prevent any of LASH's six offices with only one attorney (or less) from engaging in constitutionally protected activities, even with non-LSC funds. Three of those offices are the only LASH office on their island, so that the **prohibition against shared staff** would effectively end advocacy in connection with LSC-restricted activities for the isolated populations of those islands.")

separate as to not **share common offices or staff** as the Final Rule appears to require, would force the SFVNLS to break apart its centralized, resulting in a number of difficulties and problems."); Declaration Robert J. Cohen, Executive Director of LASOC, ("[A] serious question would arise as to whether the hotline could provide advice and referral services for an affiliate or subcontractor without violating numerous restrictions and requirements of the new rule, including indirect **subsidy, separation of personnel, and separation of facilities**") ; Declaration of Robert K. Hickerson, Executive Director of ALSC, ¶ 8 ("As a practical matter, compliance with the **separate facilities and separate personnel requirements** of Final Rule 45 C.F.R. Part 1610 would be all but unworkable.").

Even assuming that Plaintiffs on a practical level may experience some difficulty abiding by the insularity requirement, that would not be constitutionally dispositive. The unconstitutional conditions doctrine does not require regulations to eliminate all practical difficulties in pursuing the alternative channels in order to pass constitutional muster. If it did, few regulations concerning the use of congressional money would be constitutional.

For instance, in Rust, the Court held that the regulations did not impose an unconstitutional condition on Title X employees because "the regulations, which govern solely the scope of the Title X project's activities, do not in any way restrict the activities of those persons acting as private individuals." Id. at 198-99. Yet, it does not seem unlikely that certain Title X employees would be unable to pursue abortion-related advocacy on their free time. As an example, a Title X employee may have familial duties or other financial needs which require that he work full-time for Title X plus childcare issues or other demands that preclude him

from using his free time to engage in abortion-related activities. In that case, on a practical level, Title X restrictions according to Plaintiffs' argument would constitute an unconstitutional condition on that employee, i.e., in order to receive the benefit of working for a Title X project, he forfeits his First Amendment rights to engage in abortion advocacy. However, it pushes the bounds of reason to believe that the Supreme Court would have invalidated Title X simply because of this employee's difficulties in exercising his constitutional rights.

Yet, that is what the Plaintiffs are asking the Court to do here. For example, LASH states that to engage in LSC restricted activities in their one attorney Molokai office it would need to either "(i) reduce from full-time to part-time status the lawyers at LASH's single lawyer offices and hire part-time employees to do LSC restricted work, or (ii) discontinue LSC-restricted activities." See Dudovitz Declaration, ¶ 14-15. The declaration goes on to say that "[b]ecause of the unavailability of people with the required talents, interest or abilities to work only part-time, it will be virtually impossible on some islands to employ part-time to engage in LSC-restricted activities." Id. In other words, Plaintiff is arguing that the LSC restrictions are unconstitutional because if the LASH's Molokai office decided to engage in restricted activities, it may not be able to provide the same caliber attorney as it does now. This, like the fictitious Title X employee, is no basis for striking down the entire LSC scheme. Moreover, LASH has many practical options for maintaining its Molokai office. LASH can create an affiliate organization that engages in restricted activities on one of the other islands and simply refer any cases

involving the restrictions arising out of Molokai to that office. LASH can also divert moneys from its other offices to fund a full-time non-LSC funded office on Molokai.[11] These latter options illustrate just a few of the possible alternatives LASH has for exercising its constitutional rights even in its Molokai office.

2. The Supreme Court has previously found the separate incorporation requirement not to be unduly burdensome

The Supreme Court has found the requirement of separate incorporation not "unduly burdensome." See Regan v. TWR, 461 U.S. 540, 544 n.6 (1983). In TWR, the Supreme Court upheld IRS regulations that only granted tax exemptions to non-profit corporations which did not lobby because TWR "could obtain tax deductible contributions for its non-lobbying activity by returning to the dual structure it used in the past, with a § 501(c) (3) organization for non-lobbying activities and a § 501(c) (4) organization for lobbying." Id. In noting the availability of alternative channels, the Court addressed an argument that the IRS could "make it impossible for a § 501(c) (3) organization to establish a § 501(c) (4) affiliate." The Court rejected the argument noting that:

> The IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax deductible

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[11] The amended regulations allow a LSC funded organization to transfer non-LSC funds to its affiliate without subjecting that affiliate to the LSC's restrictions.

contributions are not used to pay for lobbying. **This is not unduly burdensome.**

Id. at n.6. Under TWR, therefore, the requirement of separate incorporation alone does not seem to pose any serious constitutional infirmities.

The issue, therefore, is whether the separate incorporation requirement combined with the insularity requirement impermissibly restricts a legal aid organization's alternative channels.

The requirement of separate incorporation does not in any significant way add to Plaintiffs' burden. After all, under the Rust-approved restrictions, Plaintiffs will already need to have separate facilities and separate personnel if they decide to engage in restricted activities. As groups consisting of attorneys, moreover, Plaintiffs' burden in filing incorporation papers cannot be deemed excessive. Consonant with these common sense observations, Plaintiffs have not proffered any facts that the separate incorporation requirement imposes any significant burden. Thus, the Court finds that the combination of the separate incorporation requirement with the dictate concerning separate personnel and facilities does not create an unconstitutional burden on Plaintiffs' exercise of their constitutional rights. Plaintiffs can still create a separate organization with different facilities through which to exercise their constitutional rights.

3. The ability to control the alternate organization differentiates the present regulations from the previous regulations

Plaintiffs argue that allowing a completely separate entity with different facilities and personnel to engage in the

constitutionally protected restrictions does nothing for the original LSC funded entity which cannot engage in such activities. See Plaintiffs' motion for summary judgment, pg. 25. The Court agrees. As the Supreme Court noted in TWR, "It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." See TWR, 461 U.S. 540, 553 ((Blackmun, J., concurring).

The Court, however, reads the new regulations as allowing the original entity to exercise control over the second entity as long as the other requirements of § 1610.8 are met. The Court adopts this reading for three reasons.

First, the LSC in its briefs and at the hearing acknowledge that the new regulations allow a LSC-funded organization to completely control an affiliate that engages in restricted activities as long as § 1610.8 is met. In fact, at the hearing, the LSC stated that the two organizations (i.e., the LSC funded organization and its affiliate) could have overlapping boards of directors thereby assuring, on a practical level, the LSC funded organization's ability to control its affiliate.

Second, as the Supreme Court in Rust stated: "a decision to declare an Act of Congress unconstitutional 'is the gravest and most delicate duty that this Court is called on to perform." Rust, 500 U.S. at 191. Thus, "'as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.'" Id. at 190, citing Blodgett v. Holden, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). Here, following the adage of Justice Holmes, the

Court interprets the regulations in the manner most likely to salvage them.[12]

Lastly, in amending the regulations, the LSC deleted the provisions concerning "control" of the affiliated organizations that troubled this Court in its initial order. See 50 Fed. Reg. § 49279, Legal Aid, 961 F. Supp. at 1415. The Court reads this deletion as intentional and significant and as allowing an organization that receives LSC funds to control another organization that engages in restricted activities so long as the two organizations comply with the present regulations.

The commentary to the final inter-related provision (62 Fed. Reg. § 27700) supports the Court's interpretation. To understand the significance of the changes, however, some background is needed. After the Court's order, the LSC issued interim regulations on March 14, 1997.[13] The interim regulations maintained the previous "control" centered policy (struck down in the Court's initial order) in section (a), but

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[12] In addition, the Plaintiffs must overcome the facial challenge doctrine. As the Court stated in its earlier order:

> Because Plaintiffs challenge the facial validity of the regulations, Plaintiffs 'must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.'

Legal Aid, 961 F. Supp. 1402, 1417, quoting, Rust v. Sullivan, 500 U.S. at 183.

[13] These regulations spurred the Court to issue its show cause order on April 7, 1997.

created an exception for organizations that fulfilled the requirements set out in a section (b) See 62 Fed. Reg. 12103-4. The requirements in section (b) mirror much of the language of the current regulations.

Before issuing its final regulation at issue here, however, the LSC deleted section (a) of the interim regulation. In the commentary to the present regulations, the LSC explains why it deleted the language concerning control. In particular, the LSC explained that:

> The purpose of the [previous inter-related] policy was to establish whether a relationship existed between the recipient and another organization, such that the recipient and the other organization actually operated as one, rather than two separate organizations. **The Board determined that if a program is found to be in compliance with the second step of the program integrity test, there would be sufficiently separate identity and operational independence from the recipient.**

See 62 Fed. Reg. 27697 (emphasis added). The control provision was deleted, therefore, because the precursor to the present regulations achieved the insularity that Congress sought to create between the organizations that receive LSC funds and their affiliates that may engage in restricted activities. Accordingly, the Court finds as long as the requirements set forth in the regulations are met, a LSC-funded organization can exercise control over affiliate organizations that engage in restricted activities.

With the ability to control the separately incorporated and insular second organization, the Court finds that alternative channels exist for LSC-funded organizations to pursue their

constitutionally protected activities. Thus, even construing the facts most favorably to the Plaintiffs[14], the regulations do not constitute an unconstitutional condition and thus are not violative of Plaintiffs' First Amendment rights.

IV. Plaintiffs' Equal Protection and Due Process arguments

In their motion for summary judgment, Plaintiffs also renew their numerous Due Process and Equal Protection complaints. The Plaintiffs' complaints focus on the effect the restrictions have on the indigent clients of the legal aid organizations.

1. The CSCC has standing to assert the rights of the indigent clients

In their briefs, the DOJ argues that the Plaintiffs lack standing to bring claims on behalf of their clients. See DOJ's Motion for Summary Judgment, pg. 24.

To have standing to bring suit, Plaintiffs must prove: (1) "an injury in fact;" (2) "a causal relationship between the injury and the challenged conduct;" and (3) "a likelihood that the injury will be redressed by a favorable decision." Northeastern Florida Contractors v. Jacksonville, 113 S.Ct. 2297, 2302 (1993). The "injury in fact" requires an "invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not 'conjectural'

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[14] At the hearing, Plaintiffs acknowledged that this case did not contain any material issues of fact and was "ripe" for summary judgment whichever way the Court decided to rule.

or 'hypothetical'." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

In addition, parties seeking prospective injunctive relief "must show that [they] 'ha[ve] sustained or [are] immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural or hypothetical'." City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." Id.

Moreover, Plaintiffs at the summary judgment stage "can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment will be taken to be true." Lujan, 504 U.S. 555, 560 (1992).

In the reply to their motion for summary judgment,[15] Plaintiffs assert that indigent clients are parties to this action through the California State Client Council ("CSCC") and are being denied access to the courts because of the LSC regulations. See Plaintiffs' reply, pg. 17, citing Declaration of Lucinda Horne attached to Plaintiffs' motion for a preliminary injunction. Clearly, the CSCC is not a client per se but it is an "unincorporated association . . . whose members are indigent clients." See Horne Declaration, ¶ 3-4. As an association, CSCC may have standing to bring this action if the association alleges "'such a personal stake in the

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[15] Remarkably, the Plaintiffs did not respond to the DOJ's standing argument in their opposition to said motion.

outcome of the controversy' as to warrant . . . invocation of federal-court jurisdiction'". Havens Realty Corporation v. Coleman, 455 U.S. 363, 378-379 (1982).

CSCC has done as much here. Through the Horne declaration, CSCC claims that its "own organizational efforts have been adversely affected by LSC restrictions . . . because the new LSC restrictions have prevented some legal services programs, such as LASOC, from using LSC money." Thus, the Court finds that CSCC has alleged an "injury-in-fact." See Havens Realty, 455 U.S. at 379 (holding that impairment of an organization's aims constitutes an "injury-in-fact"). The "injury-in-fact", moreover, can be linked to the restrictions at issue here and likewise would be redressed if the Court were to strike down the restrictions. Accordingly, the Court finds that the CSCC has standing to challenge the restrictions on behalf of the clients.[16]

2. Plaintiffs' Due Process arguments fail for the same reason that the Court in Rust rejected the argument that the Title X regulations violated the petitioners' Fifth Amendment right to terminate their pregnancy

Plaintiffs assert a whole array of Due Process arguments including: (1) the indigent clients' right to retain and consult counsel of their choice, and (2) the indigent clients' right to engage in meaningful advocacy. The Court has serious questions concerning the breadth and viability of these constitutional rights. Nevertheless, even assuming that these

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[16] The Supreme Court, moreover, has held that attorneys have third-party standing to assert the constitutional rights of their clients. See Caplin & Drysdale, Chartered, v. United States, 491 U.S. 617, 623 n. 3.

rights are recognized, the Court finds that they are not violated by the LSC regulations.

The basis of the Court's decision, once again, is the Supreme Court's decision in Rust. In Rust, the petitioners argued that the restrictions that sought to insulate abortion related activity from federally funded activities violated the constitutionally protected right to have an abortion. Rust, 500 U.S. at 201. The Court rejected the argument finding that "the regulations do not impermissibly burden a woman's Fifth Amendment rights." Id. Among other reasons, the Court ruled as such because:

> Congress' refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the Government had chosen not to fund family-planning services at all. The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the Government had not enacted Title X.

Id.

This reasoning controls the result here. To begin with, the right asserted in Rust was far more established and recognized than the amorphous rights asserted here. See e.g. Planned Parenthood v. Casey, 505 U.S. 833 (1992). In addition, and more significantly, the Court notes that Congress' refusal to fund the restricted activities here leaves the indigent clients with the same choices they would have had absent the creation of the LSC. For instance, take the case of an indigent client that wanted to challenge a welfare law. Under the current regulatory scheme, such a client could

only enlist a legal aid organization that received no federal funding[17] because the LSC bars an organization that receives LSC funds from accepting such a client.[18] Yet, if Congress decided to terminate the LSC, the client's choices would not diminish. The client could still only bring his case to non-federally funded organizations. Thus, like the petitioners in Rust, "the difficulty . . . [this indigent client encounters when a LSC organization does not provide legal assistance] leaves [the client] in no different position than he would have been if the Government had not [created the LSC]." Accordingly, the regulations cannot be deemed to "impermissibly burden" whatever Due Process rights the client may have.

In addition, as the Court has noted in its earlier discussion, the LSC restrictions allow a LSC-funded organization ample alternative channels to pursue its constitutionally protected rights. The availability of these alternative channels seriously reduces whatever impact these regulations have on the poor because the legal aid organizations' ability to create affiliates should result in the proliferation of many new organizations that can accept cases such as ones challenging the welfare laws.[19]

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[17] The hypothetical client, of course, has numerous other options in pursuing his case including enlisting a private attorney on a contingency basis, enlisting a private attorney on a pro bono basis, or pursuing the suit himself.

[18] In addition, the Court notes that under the regulations as interpreted, the federally funded organization could create a separate non-federally funded organization which could take all its prohibited cases.

[19] This reasoning applies as well to Plaintiff's Equal Protection argument.

Appendix B

3. Equal Protection Arguments

Lastly, Plaintiffs assert various Equal Protection arguments in support of their motion for summary judgment. Their first argument is that the regulations discriminate based on poverty. See Plaintiffs' summary judgment motion, pg. 31 (restrictions deny "legal services clients equal access to the courts based on their indigence and the causes they wish to espouse."). As the Court noted in the previous order, however, the Supreme Court "'has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.'" Legal Aid, 961 F. Supp. 1402, 1411 n. 10, quoting Maher v. Roe, 432 U.S. 464, 470-71 (1977). Therefore, any discrimination against the poor need only have a rational basis to pass constitutional muster. Clearly, the reasons proffered by Congress here pass such review.

Plaintiffs also submit a list of activities ranging from class actions to challenging immigration reform that they assert is barred to indigent clients by the restrictions. The Court does not exactly understand this argument. If this list is simply another take on the suspect class argument, then it fails for the reasons stated above. If it seeks to assert an Equal Protection argument based on the discriminatory distribution of fundamental rights then it fails for different reasons.

Plaintiffs acknowledge the long line of cases holding that the government need not fund the exercise of a fundamental right. See Harris v. McRae, 448 U.S. 292, 315 (1980). Thus, the lack of federal funding for the various rights listed by the Plaintiffs cannot rise to an Equal Protection violation. Plaintiffs, however, seem to be indicating that the regulations' impact on non-federal funds does violate the Equal Protection clause. The LSC, however, cannot be held

culpable if private parties decide to fund groups with certain subject matter limitations. After all, under LSC regulations, all donors of contributions exceeding $250 must be notified of the restrictions and presumably, if dissatisfied with the restrictions, can place their money elsewhere (e.g. with the federally funded organization's affiliate). See 62 Fed. Reg. § 27699. If private parties still decide to fund groups despite the LSC restrictions, that is a question more of that donor's First Amendment right to donate money (see e.g. Buckley v. Valeo, 96 U.S. 32 (1975)) than the indigent client's Equal Protection rights. Accordingly, under either theory, Plaintiffs fail to establish a viable Equal Protection claim.[20]

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[20] In their reply, Plaintiffs also argue that "the challenged restrictions are an acknowledged attempt at viewpoint regulations." Plaintiffs, however, did not raise this argument in their moving papers in violation of the Local Rules which state that "any arguments raised for the first time in the reply shall be disregarded." See Local Rule 220-4. Granted, Plaintiffs raised this argument in the preliminary injunction but the Local Rule 220-4 envisions bringing all the arguments in the instant moving papers thereby allowing the opposing party to address the argument for sake of this hearing.

The Plaintiffs, moreover, did not raise the argument at the hearing. Nevertheless, the Court finds Plaintiffs' viewpoint discrimination claim without merit. In Rust, the petitioners argued that Title X's prohibition on abortion related advocacy constituted viewpoint discrimination. The Supreme Court disagreed. Instead, the Court opined that:

> the Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

(footnote continued...)

Appendix B

Because Plaintiffs fail to establish that the regulations violate either their First Amendment, Due Process or Equal Protection rights, the Court DENIES their motion for summary judgment. For the same reasons, the Court also DISSOLVES its earlier injunction, which additionally is moot because it was based on superseded regulations that no longer affect the parties. See e.g. Sannon v. United States, 631 F.2d 1247, 1250 (5th Cir. 1980) ("That newly promulgated regulations immediately applicable to litigants in a given case can have the effect of mooting what once was a viable case is without doubt."); see also National Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission, 680 F.2d 810, 814 (D.C. Cir. 1982) ("Corrective action by an agency is one type of subsequent development that can moot a previously justiciable issue.").

CONCLUSION

For the foregoing reasons, the Court GRANTS the LSC's motion for summary judgment and the DOJ's motion for

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Rust, 500 U.S. at 193. The Court finds this holding fully applicable and dispositive of Plaintiffs' argument. The LSC can fund certain cases without funding others and not engage in viewpoint discrimination.

summary judgment but DENIES Plaintiffs' motion for summary judgment. IT IS SO ORDERED.

DATED: Honolulu, Hawaii, August 1, 1997.

/s/
Chief United States District Judge

LEGAL AID SOCIETY OF HAWAII, ET AL. V. LEGAL SERVICES CORPORATION; CIVIL NO. 97-00032 ACK; ORDER GRANTING THE LSC'S AND DOJ'S MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION FILED FEBRUARY 14, 1997

Civil No. 97-00032 ACK

LEGAL AID SOCIETY OF HAWAII, et al.

Plaintiffs,

vs.

LEGAL SERVICES CORPORATION

Defendant.

This case concerns Congress' ability to place restrictions on non-federal public funds and those private funds not previously restricted (hereinafter "Non-LSC funds") where such restrictions completely foreclose the exercise of certain constitutional rights.

FACTUAL BACKGROUND

In 1974, Congress created the Legal Services Corporation, ("LSC") a private, nonprofit corporation, to distribute funds from Congress to various independent legal programs. 42 U.S.C. § 2996 et seq. The LSC is governed by an 11 member board appointed by the president and confirmed by the Senate. 42 U.S.C. § 2996a. The

congressionally established aims of the LSC include the "need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances." See 42 U.S.C. § 2996(1).

Since its zenith in the late 1970s, the LSC has increasingly come under attack. In fact, the LSC has operated without authorization since 1980 surviving only through annual appropriation bills. See e.g. Congressional Quarterly Weekly Report, 1/22/94.

More recently, many lawmakers sought to abolish the LSC. The elimination of the LSC was averted, however, when in exchange for numerous conditions placed on the funds, Congress continued funding the LSC. This suit arises out of the conditions imposed by Congress in 1996 and 1997 by the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, § 504(d)(1) ("1996 Budget") and the Omnibus Consolidated Appropriations Act of Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009, § 502(a) ("1997 Budget").

In the 1996 and 1997 Budgets, Congress placed the following prohibitions on agencies that accepted LSC funds: (1) advocating or opposing any reapportionment of a legislative, judicial or elective district on any level, 1996 Budget § 504 (a)(1); (2) influencing the "issuance, amendment, or revocation of any executive order", 1996 Budget § 504(a)(2); (3) "attempt[ing] to influence any part of any adjudicatory proceeding of any Federal, State, or local agency," 1996 Budget § 504(a)(3); (4) attempting "to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative . . . of the Congress or a State or a local legislative body" 1996 Budget Act (a)(4); (5) initiating or participating in a class action

lawsuit, 1996 Budget § 504(a)(7); (6) litigating or lobbying in an effort to reform the federal or state welfare laws or systems, 1996 Budget § 504(a)(16); (7) representing certain aliens except in cases of domestic violence, 1996 Budget § 504(a)(11); (8) "conduct [ing] a training program for the purpose of advocating a particular public policy or encouraging a political activity", 1996 Budget § 504(a)(12); (9) claiming or collecting attorney's fees; 1996 Budget Act § 504(a)(13); (10) "participating in any litigation on behalf of a person incarcerated in a Federal, State, or local prison", 1996 Budget Act § 504(a)(15); (11) representing people allegedly engaged in certain illegal drug activity in public housing eviction proceedings, 1996 Budget Act § 504(a)(16); and (12) "participat[ing] in any litigation with respect to abortion", 1996 Budget Act § 504(a)(14). These prohibitions applied to LSC as well as to non-LSC private funds.[1] The Act also required a written statement of facts be prepared by the legal aid organizations prior to initiating litigation or pre-litigation negotiations. 1996 Budget Act § 504(a)(8).

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[1] Many of these restrictions were in effect prior to the 1996 and 1997 Budgets. For instance, the 1974 Act creating the LSC prohibited recipients from using LSC funds: (1) to campaign for any candidate, 42 U.S.C. § 2996e(d) (3); (2) to advocate or oppose any "ballot measures or initiatives", id. at (d) (4); (3) to "support or conduct training programs for the purpose of advocating public policies or encouraging political activities", 42 U.S.C. § 2996f(b) (6) ; (4) "to provide legal assistance with respect to any proceeding or litigation which seeks to procure a nontherapeutic abortion" id. at (b) (8); (5) "to provide legal assistance with respect to any proceeding or litigation relating to the desegregation" of schools, id. at (b) (9); and (6) to provide legal assistance with respect to military desertion cases. In 1976, these restrictions were applied to non-LSC funds except for tribal and "interest on lawyers trust account" ("IOLTA") funds. 41 Fed. Reg. 25901; 45 C.F.R. § 1610 (1976).

Appendix C

On January 9, 1997, five legal service programs (the Legal Aid Society of Hawaii ("LASH"), Legal Services of Northern California, Inc. ("LSNC"), San Fernando Valley Neighborhood Legal Services ("SFNLVS"), Legal Aid Society of Orange County, and the Alaska Legal Services Corporation), a group representing legal services clients (California State Client Council), two organizations that have funded work by legal service programs (the Hawaii Justice Foundation and The Impact Fund), and two legal service program lawyers (Lloyd Van De Car and Gary F. Smith) (hereinafter collectively referred to as "Plaintiffs") brought suit challenging these restrictions. The Plaintiffs ask this Court to enjoin the LSC from enforcing the restrictions.

On January 14, 1997, the Court held a status conference wherein the motion for the preliminary injunction was set for February 14, 1997.[2] On January 24, 1997, the Court memorialized the briefing schedule for the hearing in an order. Pursuant to the order, the LSC filed its opposition to the preliminary injunction on January 30, 1997. The Plaintiffs filed their response on February 4, 1997. The Court held a hearing on February 14, 1997.

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[2] On January 26, 1997, the Department of Justice ("DOJ") filed a request for 30 days within which to decide whether to intervene and to file a response to the Plaintiff's motion. On January 28, 1997, the Plaintiffs and the LSC filed their respective responses to the DOJ's request. On January 29, 1997, the Court denied the DOJ's request in a written order.

Appendix C

STANDARD OF REVIEW

1. Preliminary Injunction

The standards for granting a TRO and a preliminary injunction are similar. Cf. Los Angeles Unified School Dist. v. United States Dist. Court For Central Dist. of California, 650 F.2d 1004, 1008 (9th Cir. 1981) (standard for preliminary injunction is at least as strict as that for TRO) (Ferguson, J., dissenting); Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci, 857 F.2d 505, 507 (9th Cir. 1988) (district court denied motion for TRO which was treated by stipulation as also a motion for preliminary injunction)

In Miller v. California Pacific Medical Ctr., 19 F.3d 449 (9th Cir. 1994), the Ninth Circuit set forth the standard for granting a preliminary injunction as follows:

> Traditionally we consider (1) the likelihood of the moving party's success on the merits; (2) the possibility of irreparable injury to the moving party if relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) in certain cases, whether the public interest will be advanced by granting the preliminary relief.

Id. at 456 (citing United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174 (9th Cir. 1987)).

> The moving party must show 'either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits,

> the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits.'

Miller, 19 F.3d at 456 (quoting Senate of California v. Mosbacher, 968 F.2d 974, 977 (9th Cir. 1992)).

> 'These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.'

Miller, 19 F.3d at 456 (quoting Odessa Union, 833 F.2d at 174).

The grant or denial of a TRO or preliminary injunction is reviewed for abuse of discretion. See Miss Universe, Inc. v. Flesher, 605 F.2d 1130, 1132-33 (9th Cir. 1979).

DISCUSSION

I. Likelihood of Success

In obtaining a preliminary injunction, the Plaintiffs' likelihood of success determines what other elements the Plaintiffs need to prove. If the Plaintiffs can show "**probable** success on the merits" then Plaintiffs need only "show . . . the possibility of irreparable harm." Miller v. California Medical Center, 19 F.3d 449, 456 (9th Cir. 1994). If the Plaintiffs, however, can only show a "a '**fair**' chance of success," then they must also "show that there are serious questions going to the merits of the case and that the balance of the hardships tips decidedly in its favor." Id. at 460 n.5. If

Plaintiffs cannot establish at least a "fair chance" of success, no preliminary injunction should be granted.[3]

A. Constitutional rights are at stake

To prevail, Plaintiffs must prove that the restrictions infringe their constitutional rights.[4] A sine qua non of this burden is proving that the restrictions at least implicate Plaintiffs' constitutional rights. In their effort to meet this burden, Plaintiffs recite a laundry list of constitutional rights which supposedly apply. In this case, the most compelling, and applicable, of these rights are the right to lobby and the right to associate.

The First Amendment clearly protects the right to lobby legislators and administrators. See e.g. California Motor

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[3] In its opposition, the LSC attempts to characterize the Plaintiffs' case as one involving a mandatory injunction as opposed to a prohibitory injunction. See Opposition at pg. 48. A mandatory injunction commands performance of certain acts whereas a prohibitory injunction prohibits the performance of certain acts. See e.g. Anderson v. United States, 612 F.2d 1112, 1114-5 (9th Cir. 1979). The severity of a mandatory injunction makes it a disfavored option which courts should deny "unless the facts and law clearly favor the moving party." Stanley v. University of Southern California, 13 F.3d 1313, 1320 (9th Cir. 1994).

Through this motion, the Plaintiffs seek to prohibit the LSC from enforcing the restrictions embodied in the 1996 and 1997 Budgets thereby making it a prohibitory injunction. Accordingly, the Court will apply the Miller continuum rather than the heightened standard of a mandatory injunction.

[4] It is uncontested that the LSC qualifies as a state actor for purposes of the constitutional analysis. See also Texas Rural Legal Aid v. Legal Services Corp., 940 F.2d 685, 699 (D.C. Cir. 1991) (holding that the LSC is a state actor).

Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). The right to lobby or petition, moreover, "extends to all departments of the Government." Id. at 612. Yet, Plaintiffs' right to lobby various agencies and in support of certain causes is prohibited by the LSC. For example, Plaintiffs are prohibited from: (1) advocating or opposing any reapportionment of a legislative, judicial or elective district on any level, 1996 Budget § 504 (a)-(1); (2) influencing the "issuance, amendment, or revocation of any executive order", 1996 Budget § 504(a) (2); (3) "attempt[ing] to influence any part of any adjudicatory proceeding of any Federal, State, or local agency," 1996 Budget § 504 (a) (3); (4) "attempt[ing] to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or a local legislative body" and (5) litigating or lobbying in an effort to reform the federal or state welfare laws or systems, 1996 Budget § 504 (a) (16). Because these restrictions implicate the right to lobby, the Court finds these restrictions subject to constitutional scrutiny.

The right to petition the government has also been extended to a "right of access to the courts." Id.; see also N.A.A.C.P. v. Button, 371 U.S. 415, 429 ("[U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.") The Court in Button also recognized that the right to association may be implicated when the state attempts to regulate the interaction between a legal foundation and its clients. Id. at 431 ("For such a group [a public interest legal foundation], association for litigation may be the most effective form of political association."). Moreover, "[s]ubsequent Supreme Court decisions have interpreted Button as establishing the principle that 'collective activity undertaken to obtain meaningful access to

the courts is a fundamental right within the protection of the First Amendment.'" Charles v. Daley, 846 F.2d 1057, 1074 (7th Cir. 1988) quoting In re Primus, 436 U.S. 412, 426 (1978); see also Martin v. Lauer, 686 F.2d 24, 32 (D.C. Cir. 1982) ("Meaningful access to the courts is a fundamental right of citizenship in this country. Indeed all other legal rights would be illusory without it.") (citations omitted).

The right of meaningful access to the courts, however, has only been vaguely applied and defined since its recognition in Button and California Motor. At a minimal, though, the right of meaningful access must encompass the right to vindicate constitutional rights. How meaningful would a litigants' access to the courts be if the most sacred of all rights, constitutional ones, could not be vindicated. The Court, therefore, finds that the First Amendment right of meaningful access to the courts protects a litigant's right to vindicate constitutional rights. Accordingly, the Court holds that 1996 Budget Act Section 504(a) (14) limiting participation "in any litigation with respect to abortion" implicates that right and is subject to constitutional scrutiny in view of the Supreme Court's ruling in Roe v. Wade, 410 U.S. 113 (1973), which held that the right to an abortion is protected by the Constitution.

Aside from the underlying right of meaningful access to the courts, the Supreme Court's recognition of such a right entitles it to further protection under the corresponding right of association. As the Supreme Court explained in Board of Dirs. of Rotary Intern. v. Rotary Club:

> [T]he right to engage in activities protected by the First Amendment implies a 'corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational,

> religious, and cultural ends.' For this reason, 'impediment to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment.'

481 U.S. 537, 548 (1987) (citations omitted) ; see also Shahar v. Bowers, 70 F.3d 1218, 1225 (11th Cir. 1995) ("Expressive association is the 'right to associate for the purpose of engaging in those activities protected by the First Amendment'"). Like all First Amendment rights, infringement of the right to association may be justified by a compelling governmental interest. Id. at 549.

Read together, the freedom of association defined above coupled with the right of meaningful access to the courts provides First Amendment protection from government's intentional interference with the confidential relationship between lawyers (or legal aid associations) and prospective clients. See e.g. Haitian Refugee Center, Inc. v. Baker, 953 F.2d 1498, 1513 (11th Cir. 1992) ("Button and In re Primus recognize a narrow First Amendment right to associate for the purpose of engaging in litigation as a form of political expression"). This right can be regulated (especially in cases involving pecuniary gain) but cannot be completely foreclosed absent a compelling interest. See e.g. In re Primus, 436 U.S. 412, 426 (1978) (holding that broad rules regulating attorneys cannot be enacted if they impair the First Amendment fundamental right of collective activity undertaken to obtain meaningful access to the courts). The Court, therefore, finds that the following LSC regulations implicate the foregoing First Amendment right: (1) 1996 Budget Act Section 504(a) (16) limiting Plaintiffs from representing people allegedly engaged in certain illegal drug activity in public housing eviction proceedings; and (2) 1996 Budget § 504(a)(12) preventing Plaintiffs from "conduct[ing]

a training program for the purpose of advocating a particular public policy or encouraging a political activity."

Not all the restrictions, however, fit neatly within the right to associate. For instance, the 1996 Budget Act Section 504(a) (15) limiting Plaintiffs from "participating in any litigation on behalf of a person incarcerated in a Federal, State, or local prison" involves issues concerning a prisoner's right of association.[5] Unlike an ordinary citizen, the associational rights of prisoners "may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations, possess the likelihood of disruption of prison order or stability . . . ." Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 132 (1977); see also Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985). Here, however, there is no reason why the Plaintiffs' legal assistance "possess[es] the likelihood of disruption of prison order or stability." Accordingly, the Court finds that 1996 Budget Act Section 504(a)(15) implicates Plaintiffs' First Amendment rights.

The regulations concerning aliens must also be analyzed differently. See 1996 Budget Section 504(a)(11) limiting Plaintiffs from representing illegal aliens except in cases of domestic violence. As the Supreme Court has stated

> "Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the

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[5] Although the Court is looking at the Plaintiffs' association rights, the Plaintiffs' rights cannot be separated from the parties with whom they wish to associate with.

> enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded as any aspect of our government.

Galvan v. Press, 347 U.S. 522, 531-32 (1954). In accordance with this policy, courts have not protected an aliens' rights of association.[6] See e.g. Galvan v. Press, 347 U.S. 522, 530-32 (1954) (upholding deportation of alien who joined the communist party); Kleindienst v. Mandel, 408 U.S. 753 (1972) (holding that nonresident alien could not assert First Amendment right). In fact, the Supreme Court has even found that citizens' First Amendment rights of association insufficient to warrant interference with Congress' power concerning aliens. Kleindienst v. Mandel, 408 U.S. 753 (1972) (rejecting citizens' First Amendment arguments in light of Congress' power concerning aliens.) Those same considerations apply here. If Congress in its near plenary power over aliens decides that legal aid associations and their lawyers should not represent them, that decision should not be disturbed. Consequently, the Court finds that 1996 Budget Section 504(a) (11) limiting Plaintiffs from representing illegal aliens except in cases of domestic violence does not implicate Plaintiffs' constitutional rights.

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[6] Recently, four Justices voted that the First Amendment does not even apply to aliens. United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990); accord Unites States ex rel. Turner v. Williams, 194 U.S. 279 (1904) (holding that excludable aliens are not entitled to First Amendment rights).

Appendix C

The Court also questions whether the First Amendment right to associate for the purpose of engaging in litigation as a form of political expression extends to class actions.[7] See 1996 Budget Section 504 (a) (7) limiting the initiation or participation in a class action lawsuit. No appellate court has previously extended First Amendment protections to class actions despite encouragement from scholars. See e.g. John Leubsdorf, Constitutional Civil Procedure, 63 Tex. L. Rev. 579, 617. Not that such an extension would be completely unwarranted. In California Motor Transport, an antitrust case, the Supreme Court concluded "that it would be destructive of rights of association and petition to hold that groups with common interests may not . . . use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view." 404 U.S. 508, 510-11 (1972). This reasoning could very well apply to class actions.

If the Court accepted this reasoning, however, Rule 23 would be transformed into a constitutional entitlement. Given the recent resurgence of class actions,[8] the Court questions whether they rise to a constitutional entitlement.[9] The Court, moreover, finds it imprudent to constitutionalize the rules of

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[7] A Supreme Court in New York has found that the LSC restrictions concerning class actions not only implicate First Amendment rights but infringe them as well. Varxhavsky v. Geller, Index No. 40767/91 (N.Y. Sup. Ct. 12/24/96)

[8] The Court notes that although the prominent use of class actions is a recent phenomena, some scholars assert that class actions have been around for over 800 years. See Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action (Yale University Press, 1987).

[9] For instance, the Button case decided in 1963 predates Rule 23 as we know it, enacted in 1966.

civil procedure absent any appellate precedent. Thus, at this point, the Court finds that 1996 Budget Section 504(a) (7) limiting the initiation or participation in a class action lawsuit does not implicate any constitutional rights.[10]

Finally, the Court is unpersuaded by Plaintiffs' arguments asserting a constitutional right from: (1) 1996 Budget Act Section 504(a) (13) preventing Plaintiffs from claiming or collecting attorney's fees under federal or state law; or (2) 1996 Budget Act Section 504(a) (8) requiring that a written statement of facts be prepared by the legal aid organizations prior to initiating litigation or pre-litigation negotiations. With regard to attorney's fees, Plaintiffs do not cite any authority that fee-shifting provisions violate Due Process or implicate the First Amendment. Moreover, because the provision does not implicate a suspect class, under Equal Protection the restriction need only pass rational basis which it clearly does; e.g. interest in ensuring that cases are not brought by legal aid foundations solely to collect fees. Section 504(a) (8) also appears to implicate no constitutional

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[10] The Court finds that Plaintiffs' Due Process argument concerning the right to bring class actions similarly unavailing. Like the First Amendment right, the Due Process Clause merely "encompasses a right of access to the courts" that has never been applied to class actions. See Los Angeles County Bar Association v. Eu, 979 F.2d 697, 705 (9th Cir. 1992). Thus, the same concerns discussed earlier -- constitutionalizing civil procedure; no appellate guidance -- apply.

Finally, Plaintiffs' efforts in establishing an Equal Protection violation also fail. No suspect classification is involved in Congress' decision to prohibit legal aid organizations from bringing class actions. See Maher v. Roe, 432 U.S. 464, 470-1 (1977) (The "Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis). Thus, Congress' decision need only have a rational basis to pass constitutional muster.

rights. Plaintiffs argue that the regulation tilts the playing field in that other parties need not prepare a statement of facts. The implementing regulation (45 C.F.R. 1636), however, limits the statement's access to the LSC and Federal agencies auditing the LSC.[11] Thus, any inequality present certainly does not rise to a Due Process issue. In addition, the fact that the Due Process Clause recognizes a right of meaningful access to the courts does not transform every disparity among parties into a constitutional issue. The Court, therefore, finds that 1996 Budget Act Section 504(a) (13) preventing Plaintiffs from claiming or collecting attorney's fees under federal or state law and the 1996 Budget Act Section 504(a) (8) requiring that a written statement of facts be prepared by the legal aid organizations prior to initiating litigation or pre-litigation negotiations do not implicate Plaintiffs' constitutional rights.

In short, certain LSC restrictions do not implicate constitutional rights and should not be enjoined. Other restrictions, however, are implicated by Plaintiffs' First Amendment right to petition and association. The question, therefore, becomes whether those latter restrictions not only implicate the First Amendment but whether they also impinge the First Amendment.

B. An overview of Unconstitutional conditions

The issue of subsidies/penalties and the First Amendment has bedeviled courts for years. A primary reason for the confusion has been the doctrine of "unconstitutional

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[11] The regulations do leave open the possibility that the statements may be discoverable but this Court finds such a possibility unlikely.

conditions." The Court best defined the doctrine in Perry v. Sinderman, 408 U.S. 593 (1972)

> [E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible.

Id. at 597.[12] On the surface, this doctrine appears straightforward. In its application, however, "determining the constitutionality of government subsidization of expression is one of the most frustrating tasks . . . of the First Amendment." Martin H. Redish & Daryl Kessler, Government Subsidies and Free Expression, 80 Minn. L. Rev. 543, 544 (1996)

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[12] The very essence of the doctrine -- that the government does not have absolute discretion in its funding decisions -- undermines the LSC's argument that it has a constitutional right not to speak. See LSC's opposition at pg. 35. After all, if the government did have a right not to speak, Congress' decisions on funding would be entitled to constitutional protection and could not be challenged.

Appendix C

Despite its pitfalls, three Supreme Court cases have shed more light on this tortured doctrine. See Regan v. Taxation with Representation, 461 U.S. 540 (1983) ("TWR"); Federal Communications Commission v. League of Women Voters, 468 U.S. 364 (1984) ("League"); Rust v. Sullivan, 500 U.S. 173 (1990) ("Rust")

1. Regan v. Taxation with Representation

The Court in TWR confronted the issue whether an Internal Revenue Service ("IRS") provision that only granted tax exemptions to non-profit corporations which did not lobby violated TWR's constitutional right to lobby. 461 U.S. at 542. In short, TWR argued that in exchange for receiving deductions, it forfeited its right to lobby in violation of the unconstitutional conditions doctrine. Id. at 545.

The Supreme Court disagreed. First, the Court found that Congress has "especially broad discretion in creating classifications and distinctions in tax statutes" which entitles tax laws to a "presumption of constitutionality." Id. at 547. Second, the Court rejected TWR's argument "that First Amendment rights are somehow not fully realized unless they are subsidized by the State." Id. at 546. Third, the Court found the provision to be content-neutral. Id. at 548 ("We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect.")

Finally, the Court found that the IRS did "not deny TWR the right to receive deductible contributions to support its non- lobbying activity." Id. The Court relied on the fact that TWR could:

> obtain tax deductible contributions for its non-lobbying activity by returning to the dual structure

> it used in the past, with a § 501(c) (3) organization for non-lobbying activities and a § 501(c) (4) organization for lobbying

Id. at 544. The relative import of these various holdings became clearer in Rust and League.

2. FCC v. League of Women Voters

The Court in League confronted the issue whether the Corporation of Public Broadcasting's ("CPB") condition forbidding "any noncommercial educational station that receives a grant . . . [from] engage[ing] in editorializing" violated the First Amendment. 468 U.S. at 365.

The government sought to justify this rule by construing TWR as allowing Congress "in the proper exercise of its spending power, [to] simply determin[e] that it 'will not subsidize public broadcasting station editorials." Id. at 399. The Court rejected the government's argument reasoning that TWR's holding hinged on the fact that the organizations that lobbied "remained free' to receive [tax-]deductible contributions to support nonlobbying activit[ies]" by creating two separate entities, one under § 501(c) (3) and another under § 501 (c) (4) Id. at 399-400 (brackets in the original]. The Court concluded that "[g]iven that statutory alternative," the restriction in TWR passed constitutional muster. Id. at 400.

In contrast, the Court found that the CPB prohibition against editorializing precluded a station from segregating its editorializing activities from its noneditorializing activities. Id. Thus, "a noncommercial educational station that receives only 1% of its overall income from CPB grants is barred absolutely from editorializing." Id. Based on the inability to

segregate, the Court found the CPB restriction to be an unconstitutional condition. Id. ("The station has no way of limiting the use of its federal funds to noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity.") In fact, the Court even discussed how the CPB scheme could pass constitutional muster if "noncommercial educational broadcasting stations (were permitted] to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds." Id.

3. Rust v. Sullivan

The Supreme Court next confronted the unconstitutional conditions doctrine in 1991 in the case of Rust v. Sullivan, 500 U.S. 173 (1991)

At issue in Rust was a regulation promulgated by the Department of Health and Human Services ("HHS") that attached three principal conditions to federal funds for a family planning program known as Title X. 500 U.S. at 179. First, the recipient of federal funds could "not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." Id. Second, the recipient could "not encourage, promote or advance abortion as a method of family planning." Id. at 180. This restriction included a ban on any lobbying and the use of any "legal action to make abortion available." Id. Third, the recipient of the funds must be "'physically and financially separate' from prohibited abortion activities." Id. To determine whether recipients fulfilled the latter requirement, the regulations set forth a list of factors that included "the existence of separate accounting records and separate personnel, and the degree of physical

separation of the project from facilities for prohibited activities." Id. at 181.

The recipients of these funds and the doctors sued the Secretary of the HHS claiming, inter alia, that the regulations (1) impermissibly discriminated based on viewpoint of the recipient; and (2) constituted an unconstitutional condition. The Court rejected both arguments.

With respect to the first argument, the Court held that the government had "not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." Id. at 193. The Court further stated that:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.

Id.[13]

In response to the unconstitutional conditions argument, the Court examined whether the restrictions completely denied recipients the right to engage in pro-choice activities. The Court concluded that it did not stating that:

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[13] Although the Court does not discuss Plaintiffs' argument concerning viewpoint discrimination (e.g. litigating to reform welfare as opposed to litigating to maintain the status quo), the Court notes that the reasoning in Rust seems applicable. Cf. Rosenberger v. University of Virginia, 115 S.Ct. 2510 (1995).

Appendix C

> By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in League of Women Voters and Regan, not denied it the right to engage in abortion related activities. Congress has merely refused to fund such activities out of the public fisc, and **the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.**

Id. at 198 (emphasis added)

4. Rust, League of Women Voters and TWR stand for the proposition that Congress can select what to subsidize so as long as it does not completely foreclose an organization from using non-federal funds to pursue its un-subsidized viewpoints

As the survey above of the Rust, League and TWR cases indicate, the dispositive factor that explains the cases' respective results is whether the restrictions left open adequate channels for speech.[14] In TWR, the organizations could sever their lobbying activities into a § 501(c) (4) organization while allowing their other functions to maintain their § 501(c) (3) privileges thereby constitutionally salvaging the restrictions. Likewise, in Rust, the Court found that the restrictions did not deny the groups the right to engage in abortion-related activities. 500 U.S. at 198. In

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[14] The LSC agrees with the Court's rule but argues that the statutory scheme allows Plaintiffs to establish alternate entities. See LSC's Opposition at pg. 15-21.

League, however, the inability of the stations to create affiliates transformed the ban on editorializing into an unconstitutional condition. 468 U.S. at 400.

In this case, therefore, the Plaintiffs' likelihood of success rests on their ability to prove that the LSC restrictions prevent the organizations and lawyers from voicing their unsubsidized opinions.

C. Where do the LSC restrictions fall along the League, Rust and TWR continuum regarding the availability of adequate channels of speech?

The adequacy of the alternative channels surely depends on the entity involved.[15] In examining the Plaintiffs' likelihood of success, however, the Court will examine

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[15] For example, the individual lawyers' (Lloyd Van de Car and Gary F. Smith) likelihood of success seems smaller than the legal aid organizations' likelihood of success. Under the unconstitutional condition jurisprudence, the individual lawyers have adequate alternative channels, i.e., their own free time, in which to voice their opinions. However unreasonable this view may be, this Court finds that the Supreme Court clearly adopted it in Rust:

> The regulations, which govern solely the scope of the Title X project's activities, do not in any way restrict the activities of those persons acting as private individuals. The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.

500 U.S. at 198.

whether adequate, alternative channels exist for the organizations to voice their un-subsidized opinion.[16]

In examining the opportunity of the organizations to voice their opinions, the Court compares them to the organizations in League, TRW, and Rust. Upon deeper observation, the Court finds that the organizations in those cases comprise a continuum of the availability of alternate channels with League on one end (no alternate channels), TWR on the other (alternate channels readily obtainable), and Rust in the middle (alternate channels theoretically obtainable).

1. The LSC's regulations narrow the availability of alternate channels more than the § 501(c) (3) regulations did in TWR

Clearly, the LSC's regulations narrow the availability of alternate channels more than the § 501(c) (3) regulations did in TRW. In TRW a group that wanted to lobby needed only to create a § 501(c) (4) organization and "keep records to show that tax deductible contributions [the § 501(c)(3) funds] [we]re not used to pay for lobbying [the § 501(c) (4) activities]." 461 U.S. at 544, n.6. As the Supreme Court pointed out, these regulations were "not unduly burdensome." Id.

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[16] The Court firmly rejects the LSC's argument which seemed to suggest that corporations are not entitled to First Amendment protection. The Supreme Court has clearly stated that the determination of whether speech comes within the purview of the First Amendment does not depend on the entity that utters it but on whether the state seeks "to abridge speech that the First Amendment is designed to protect." See Pacific Gas & Elec. v. P.U.C. of California, 475 U.S. 1, 8 (1986); see also First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 776-778 (1978)

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In contrast, the LSC regulations look beyond whether the funds of a recipient are kept separately from other organizations that may engage in prohibited activities. Instead, the LSC prohibits an organization from creating another organization to pursue prohibited activities if the first organization maintains "direct or indirect ability to: (a) Determine the direction of management and policies; or (b) influence the management or policies of . . . [the second organization] to the extent that an arm's length transaction may not be achieved." See 50 Fed. Reg. 49279 (1985). In making this determination, the LSC examines eight factors including: "(c) History of relationships among the organizations (e.g. the fact that one organization provided initial funding and named initial directors of another would be a relevant factor; as would facts relating to decision-making on policies or transactions of mutual interest; actual control of particular decisions) ; [and] (d) Close identity of interest."[17] Id. By focusing on influence as opposed to the provision of funds, the LSC reduces the availability of alternative channels more than the IRS did in TWR. Thus,

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[17] The other factors are: "(a) Extent and pattern of any overlap of officers, directors, or other managers among organizations; (b) Contractual and financial relationships (especially in terms of the proportion of a possibly controlled organization's funds or resources that are provided by the controlling organization); . . . (e) One organization has become a mere conduit, 'incorporated pocketbook,' or 'straw' party for another whether or not there was an attempt to work an injustice or promote a fraud; (f) Funds are solicited by a separate entity in the name of and with the expressed or implicit approval of the recipient and substantially all of the funds solicited are intended by the contributor or are otherwise required to be transferred to the recipient or used at its discretion or direction; (g) A recipient transfers resources to another entity that holds these resources for the benefit of the recipient ; and (h) A recipient assigns functions to an entity whose funding is primarily derived from sources other than public contributions." 59 Fed. Reg. 49279

this case falls on the unconstitutional side of TWR on the availability of alternate channels continuum.

2. The factors employed by the LSC in determining interrelatedness of organizations coupled with the regulations in Rust suggest that the LSC restricts the availability of alternative channels more than the regulations did in Rust

The more difficult question (and the more contested between the parties) consists of what side of the continuum this case falls with regard to Rust. To begin with, the regulations in Rust stated that "mere bookkeeping separation of title X funds from other monies is not sufficient." 42 C.F.R. § 59.9 (1995) Rather, the Rust regulations inquired into whether the funded project had "objective integrity and independence from prohibited activities." Id. The regulation in Rust relied upon four factors to determine "objective integrity":

> (a) The existence of separate accounting records; (b) The degree of separation from facilities (e.g. treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities; (c) The existence of separate personnel; and (d) The extent to which signs and other forms of identification of the title X project are present and signs material promoting abortion are absent.

Id.

In its opposition, LSC states that its "interrelated organizations policy is less strict than the structural separation rules upheld in Rust." See LSC's Opposition at

pg. 19. In support of this assertion, LSC argues that its regulations do not contain a counterpart to regulation (c) of Rust which stated that the "existence of separate personnel" should be considered in determining "objective integrity."

Technically, the LSC is correct, its regulations do not explicitly set forth that the overlap of personnel between the two organizations should be examined. Yet, taken as a whole, the requirements implicitly (and sometimes explicitly) impose such a standard. Explicitly, the LSC regulations state that the "overlap of officers, directors, or other managers among organizations" should be considered. 50 Fed. Reg. 49279. This rule in a practical sense acts in the same way as the separate personnel factor did in Rust. After all, the only legal aid employees likely to have the experience, wherewithal, commitment and reputation to begin their own legal aid foundations are officers, directors and managers.

Yet, even in the unlikely situation that a non-manager decided to open a legal aid agency, and further decided to hire personnel from the other legal aid foundation, the LSC restrictions would probably still apply. First, to hire away the workers from the first organization, there would need to be a "close identity of interest." See 59 Fed. Reg. 49279 1-7(d). Obviously, employees of the first organization are not likely to join the second organization unless the interests of the organizations coincide. Moreover, the second organization would arguably transgress the "history of relationships among the organizations" factor. Thus, although the LSC regulations do not explicitly forbid the overlap of employees, the broad definition of interrelatedness, in practice, serves to prevent one organization from having the same personnel of another. In that regard, the LSC regulations cannot be said to be more liberal than those in Rust.

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On the contrary, the Rust regulations appear far more expansive in allowing an organization to pursue its abortion-related speech than the LSC is in allowing a legal aid foundation to, say, lobby for welfare reform. For instance, in regulation, 42 C.F.R. 59.10, entitled "Prohibition on activities that encourage, promote or advocate abortion," the HHS provides a few examples of what is allowed under the regulations. These examples are telling. Example 4 states as follows:

> An organization conducts a number of activities, including operating a title X project. The organization uses non-project funds to pay dues to an association which among other activities, engages in lobbying to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association by the organization does not violate . . . this section.

42 C.F.R. § 59.10(b) (4). Example 5 states as follows:

> An organization that operates title X project engages in lobbying to increase the legal availability of abortion as a method of family planning. The project itself engages in no such activities and the facilities and funds of the project are separate from the prohibited activities. The project is not in violation of . . . this section.

Id. at (b)(5).

Neither of these examples would be permitted under the LSC regulations. In Example 4, the fact that the organization

"operates" the Title X project suggests that it would be deemed an interrelated organization by the LSC because to "operate" an entity most likely encompasses the "direct or indirect ability to . . . influence the management or policies of the [entity]." Similarly, in example 5, the organization's operation of the Title X entity would, under the LSC's regulations, preclude it from lobbying in violation of the LSC restrictions.

As these regulations make clear, and as the Court pointed out in Rust, "Title X expressly distinguishes between a Title X grantee and a Title X project." The LSC regulations do not. In that regard, the LSC regulations fall on the unconstitutional side of Rust on the continuum.

3. The expansive view of inter-relatedness among organizations makes the LSC regulations most similar to those in League

The LSC regulations resemble closest the ones struck down in League. In light of the expansive "inter-relatedness" definition, an organization that receives 1% of funding from the LSC is practically prevented from engaging in any of the prohibited activities. This smacks of an unconstitutional condition.[18] Accordingly, the Court finds that Plaintiffs have

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[18] The Court further finds that the Plaintiffs have a significant likelihood of proving that the LSC does not have a reasonable, let alone compelling, interest in preventing Plaintiffs from using non-LSC funds to create a separate organization that could engage in the restricted activities. See e.g. FCC v. League of Women Voters, 468 U.S. 364 (1984) (striking down restriction on editorializing that prevented organizations from using private funds to create a separate organization in which to exercise their First Amendment rights). Because the LSC's interest in restricting the non-LSC funds is not even reasonable, deeming the LSC program a public

(footnote continued...)

a significant likelihood of success in prevailing on their unconstitutional condition argument.[19]

The Plaintiffs' likelihood of success, however, shrinks to "fair" considering the burden they face. Because Plaintiffs challenge the facial validity of the regulations, Plaintiffs "must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid." Rust, 500 U.S. at 183 [brackets in original] [citations omitted].[20] Nevertheless, the Court finds that the Plaintiffs have established a fair likelihood of establishing that no such circumstances exist.

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forum will not salvage it. Perry Educational Association v. Perry Local Educators' Association, 460 U.S. 37, 47 (1983) (holding that the state may regulate a public forum so long as "the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

[19] The LSC defends its broad inter-related provision by claiming that the "LSC has never applied it to bar a non-grantee from engaging in prohibited activities." See Opposition at pg. 20. LSC's purported lack of enforcement, however, does not make the regulation immune from constitutional attack. Rather, Plaintiffs must resort to a facial challenge of the regulations. See e.g. FCC v. League of Women Voters, 468 U.S. 364 (1984) (striking down statute as an unconstitutional condition after facial attack)

[20] The Court agrees with the LSC that the Supreme Court's decision in Osborne v. Ohio which imposed a duty on courts to adopt narrowing construction of statutes so to save them from possible invalidity applies. The Court, however, finds that even narrowing the regulations at issue here does not save them from invalidity. 495 U.S. 103, 120 (1990).

Appendix C

II. Irreparable Injury

Under the traditional test, plaintiffs must show "the possibility of irreparable injury . . . if relief is not granted" in order to obtain a preliminary injunction. The Plaintiffs' have met this burden.

Failure to partially grant Plaintiffs' preliminary injunction could result in the continued infringement of their First Amendment rights. The Supreme Court has noted that "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 372 (1976); 11A Wright, Miller & Kane, Federal Practice and Procedure § 2948.1, at 161 (1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). The LSC, however, takes great pains in arguing that Elrod should not be applied.[21]

LSC argues, with some persuasion, that Plaintiffs' delay in filing suit "renders their irreparable harm arguments not credible." In support of its argument, LSC relies on Oakland Tribune, Inc. v. Chronicle Pub. Co., 762 F.2d 1374 (9th Cir. 1985) which stated that a "Plaintiff's long delay before

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[21] The Court notes that Elrod does not apply to Due Process or Equal Protection violations and thus such violations must undergo traditional irreparable harm analysis. Therefore, even if the restriction concerning class actions implicates Due Process or Equal Protection, the Court finds that Plaintiffs' delay in bringing suit precludes a finding of irreparable harm. In addition, the balance of hardships concerning class actions favors the LSC. The LSC's administrative efforts in ensuring compliance with the class action restriction outweighs the Plaintiffs' hardship of waiting for a final determination on the merits before filing a class action.

seeking a preliminary injunction implies lack of urgency and irreparable harm." Id. at 1377.

Plaintiffs' have waited nine months before challenging the restrictions imposed by the 1996 and 1997 Budgets. This delay not only sheds some doubt on the Plaintiffs' proclamations of harm but it also impacts the ability of the LSC, and this Court, to thoughtfully analyze the complex issues involved. However, Plaintiffs had to give due consideration to the ramifications should they succeed in obtaining a preliminary injunction; since in prevailing they would upset the compromise Congress reached last year in funding any moneys to the LSC, which in turn might result in no further funding.

The Court finds that the delay does not undermine Plaintiffs' ability to establish irreparable harm. None of the cases cited by the LSC concerning delay involved a situation where First Amendment freedoms were violated. The Oakland Tribune case involved purported antitrust violations. The LSC did cite Lydo Enterprises. Inc. v. City of Las Vegas, 745 F.2d 1211 (1984) which involved a First Amendment claim, but no First Amendment violation. In fact, the Ninth Circuit in Lydo seemed inclined to find irreparable harm despite the delay but for its disagreement "with the court's conclusion that Lydo has made a showing that First Amendment freedoms are in fact violated." Id. at 1214. In this case, however, the Court has found that the Plaintiffs have showed a likelihood of success with regard to their First Amendment claim as to certain restrictions.

The First Amendment, moreover, is the most sacred of all rights conferred in our Constitution. Its violation, if not remedied, can "chill" other citizen's First Amendment rights. For this reason, it cannot be tolerated. Moreover, the Elrod

holding, in spite of LSC's attacks,[22] still remains the law. See e.g. San Diego Committee against Registration and the Draft v. Grossmont Union, 790 F.2d 1471, 1473 n. 3. (1986); American-Arab Anti-Discrimination v. Reno, 70 F.3d 1045 (9th Cir. 1995).

Accordingly, under Elrod, the Court finds that Plaintiffs face irreparable harm if the injunctive relief is not granted.[23]

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[22] See LSC's opposition at pg. 50.

[23] Plaintiffs' irreparable harm argument does not rely solely on the theoretical harm of their First Amendment rights. Rather, Plaintiffs have included numerous declarations that support a finding of great hardship. For instance, Plaintiffs have established that they will suffer irreparable harm if not allowed to lobby for welfare reform. In the wake of federal block grants for welfare, the states' effort in re-formulating welfare will establish an entirely new welfare system. The states are currently in the process of formulating these policies. For instance, the deadline for submitting bills to the California legislature is February 28, 1997, a mere two weeks after the hearing. See Plaintiff's Reply to Response of the United States, Declaration of Roberta Ranstrom. If the injunction is not issued, the plaintiffs will miss the opportunity to submit a bill and affect the process.

Defendants argue that the organizations will not suffer irreparable harm by the ongoing welfare debate because "Plaintiffs are free to engage in the welfare debate if they accept no LSC funds." See LSC's opposition at pg. 52. This argument completely misses the point. By foregoing the LSC funds to engage in their First Amendment freedoms, the Plaintiffs will suffer the harm of losing up to half of their income in exchange for exercising their First Amendment rights. This loss of income could result in significant cutbacks for the plaintiffs in services and employees. Although plaintiffs have no "entitlement" to the funds, the LSC cannot deny that the loss of funds, especially when the restrictions may violate the Constitution, does not rise to irreparable harm.

Appendix C

III. Balance of Hardships

Because the Plaintiffs' only established a "fair" chance of success on the merits, they must establish that the balance of hardships tips decidedly in their favor. See Miller, 19 F.3d at 456. Plaintiffs have met this burden.

The hardships faced by the plaintiffs far outweigh LSC's hardship in not imposing its restrictions, many of which may be unconstitutional. The LSC will only be prevented from imposing its restrictions concerning non-LSC funds until the Court makes a final determination on the merits.

The arguments proffered by the LSC do not alter the Court's conclusion concerning the balance of hardships. The LSC may have "a strong interest in orderly administration of its grantee programs" and it may want to allocate Congressional resources in accordance with the priorities set by Congress but these interests do not outweigh Plaintiffs' constitutional rights.[24] See Opposition at pg. 57-58. The Court does concur with the LSC's fourth rationale -- "that noncompliance may have serious, adverse repercussions for continuing [LSC] appropriations" -- but Congress' possible cessation of funding to the LSC cannot justify condoning Congress' imposition of unconstitutional conditions on the Plaintiffs. See LSC's Opposition at pg. 59.

The Plaintiffs, on the other hand, face a continual infringement of their First Amendment rights as to certain restrictions. Plaintiffs also face the prospect of providing no

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[24] The Court also disagrees with the third reason proffered by the LSC for not issuing the injunction, i.e. that it prevents "the enforcement of a validly-enacted law."

input on the welfare debate that promises to re-structure welfare 'as we know it.' Moreover, if Plaintiffs decide they cannot abide by the LSC's restrictions (and lobby for welfare), the Plaintiffs will lose all federal funding. For many of these organizations, the loss of funding will seriously impair their ability to provide the same level of services to their clients.[25]

Consequently, the Court finds that the balance of hardships tips decidedly in favor of the Plaintiffs.

IV. Public Interest

The Court also finds that the public interest favors the Plaintiffs. The public interest favors a vibrant marketplace of ideas where qualified, knowledgeable legal aid organizations are not foreclosed from representing the best interests of the indigent in the legislative and judicial arena. Moreover, there is a strong public interest in assuring that the channels of government are open to people whose legal rights have been or may be adversely affected by government action. Lastly, perhaps no greater public interest exists than protecting a citizen's rights under the constitution.

The furtherance of the public interest in addition to the balance of hardships and the Plaintiffs' fair likelihood of success entitles the Plaintiffs' to preliminary injunctive relief on the restrictions that implicate constitutional rights.

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[25] For example, without federal funding, LASH will have to close approximately one-half of its offices on three of the six islands of Hawaii. See Plaintiff's Reply, Declaration of M. Victor Geminiani, pg. 2.

Appendix C

CONCLUSION

For the foregoing reasons, the Court grants in part Plaintiffs' motion for injunctive relief. Accordingly, the Court enjoins the LSC from enforcing the following restrictions, but only to the extent that they relate to the use of Non-LSC funds, set forth in the 1996 and 1997 Budgets:

(1) advocating or opposing any reapportionment of a legislative, judicial or elective district on any level, 1996 Budget § 504(a)(1)
(2) influencing the "issuance, amendment, or revocation of any executive order", 1996 Budget § 504(a)(2)
(3) "attempt[ing] to influence any part of any adjudicatory proceeding of any Federal, State, or local agency," 1996 Budget § 504(a)(3)
(4) attempting "to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative of the Congress or a State or a local legislative body" 1996 Budget Act(a)(4)
(5) litigating or lobbying in an effort to reform the federal or state welfare laws or systems, 1996 Budget § 504(a)(16)
(6) "conduct[ing] a training program for the purpose of advocating a particular public policy or encouraging a political activity", 1996 Budget § 504(a)(12)
(7) "participating in any litigation on behalf of a person incarcerated in a Federal, State, or local prison", 1996 Budget Act § 504(a)(15)
(8) representing people allegedly engaged in certain illegal drug activity in public housing eviction proceedings, 1996 Budget Act § 504(a)(16)

(9) "participat[ing] in any litigation with respect to abortion," 1996 Budget Act § 504(a)(14).

The Court makes the attached additional findings of fact and conclusions of law as part of this ruling.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, Feb 14, 1997.

/s/

Chief United States District Judge

LEGAL AID SOCIETY OF HAWAII, ET AL. V. LEGAL SERVICES CORPORATION: CIVIL NO. 97-00032 ACK: ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 97-00032 ACK

FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING IN PART PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

LEGAL AID SOCIETY OF HAWAII, et al.

Plaintiffs,

vs.

LEGAL SERVICES CORPORATION

Defendant.

This matter was heard on the motion of Legal Aid Society of Hawaii, Legal Services of Northern California, Inc., San Fernando Valley Neighborhood Legal Services, Legal Aid Society of Orange County, Alaska Legal Services Corporation, Lloyd Van De Car, Gary F. Smith, The Hawaii Justice Foundation, The Impact Fund, and California State Client Council ("Plaintiffs"), pursuant to Federal Rules of Civil Procedure 7 and 65(a), for a Preliminary Injunction enjoining Defendant Legal Services Corporation ("LSC") from enforcing restrictions on the use by Plaintiffs of public and private funds to the extent not previously restricted (Non-LSC Funds) during the pendency of this action.

Appendix C

Having considered the papers and arguments of counsel, and being fully advised, the Court hereby finds and concludes as follows:

FINDINGS OF FACT

1. There exists a great and substantial need for the provision of legal services to the poor.

2. The plaintiff legal service organizations and attorneys are an essential, and sometimes the only, source of legal services for the poor in the respective communities they serve in areas such as housing, employment, health care, education and welfare. Without such services, the poor are unlikely to satisfy their most elemental needs and protect their most basic legal interests.

3. The plaintiff legal services organizations and attorneys have provided, and but for the challenged provisions of federal law would continue to provide, legal services for the poor in litigation, mediation, counseling, negotiation, and legislative and administrative advocacy.

4. Each of the plaintiff legal services organizations receives a portion of its funding from LSC and a portion of its funding from other sources, including state and local governments, charitable foundations, the private bar and Interest On Lawyers' Trust Accounts. Non-LSC Funds are essential to allow the plaintiff legal services organizations and their attorneys to provide effective services to the poor in the communities they serve. Each of the plaintiff legal services organizations and attorneys is ready and able to segregate their federal funds from their Non-LSC Funds and to avoid commingling them. Each of the plaintiff legal services organizations is ready and able to engage in those

types of advocacy which are prohibited under the challenged federal restrictions, relying solely upon Non-LSC Funds to support such efforts.

5. The enforcement of restrictions on the use of Non-LSC Funds by the plaintiff legal services organizations and attorneys has had and, if not enjoined, will continue to have an irreparable adverse effect upon the ability of the plaintiff legal services organizations and attorneys to provide services to their clients and prospective clients in the types of disputes and the types of proceedings prohibited under the federal restrictions.

6. If the challenged federal restrictions limit the use of Non-LSC Funds, innumerable existing and potential legal services clients will be deprived of adequate legal representation and the ability to protect their legal rights.

7. Enforcement of some of the restrictions as they relate to the use of Non-LSC Funds pending trial will seriously and irreparably harm the interests and rights of plaintiffs and will adversely affect the public interest, in that, among other things, the exercise of plaintiffs' constitutional rights will be impaired, the ability of the poor to obtain effective legal representation will be adversely affected and the operation of the federal and state judicial systems will be restricted and impaired.

CONCLUSIONS OF LAW

1. Based on the foregoing Findings of Fact and the Conclusions of Law set forth hereafter, the Court concludes that Plaintiffs have established (a) there is a substantial likelihood that they will prevail on the merits at trial with regard to certain restrictions; (b) that, absent an injunction,

they will suffer great and irreparable injury; and (c) that the balance of hardship tips substantially in their favor.

2. Plaintiffs, and each of them, have a constitutionally protected right under the First Amendment: to associate with each other to petition the government for redress of grievances, to file lawsuits, to engage in legislative and administrative advocacy and to associate with each other in pursuit of these constitutionally-protected interests.

3. The following restrictions implicate Plaintiffs' First Amendment rights to lobby:

> (1) advocating or opposing any reapportionment of a legislative, judicial or elective district on any level, 1996 Budget § 504(a)(1)
> (2) influencing the "issuance, amendment, or revocation of any executive order", 1996 Budget § 504(a)(2)
> (3) "attempt[ing] to influence any part of any adjudicatory proceeding of any Federal, State, or local agency," 1996 Budget § 504(a)(3)
> (4) attempting "to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative . . . of the Congress or a State or a local legislative body" 1996 Budget Act(a)(4)
> (5) litigating or lobbying in an effort to reform the federal or state welfare laws or systems, 1996 Budget § 504(a)(16)

4. The First Amendment, as interpreted by the Supreme Court in Button and In re Primus, also protects the right to associate for the purpose of engaging in litigation as a form

of political expression. This right is implicated by the LSC restrictions that prohibit legal aid organizations from:

> (1) "conduct[ing] a training program for the purpose of advocating a particular public policy or encouraging a political activity", 1996 Budget § 504(a)(12)
> (2) "participating in any litigation on behalf of a person incarcerated in a Federal, State, or local prison", 1996 Budget Act § 504(a)(15)
> (3) representing people allegedly engaged in certain illegal drug activity in public housing eviction proceedings, 1996 Budget Act § 504(a)(16)
> (4) "participat[ing] in any litigation with respect to abortion", 1996 Budget Act § 504(a)(14)

5. The Court, however, finds that neither the First Amendment, Due Process or Equal Protection prevent Congress from prohibiting the legal aid organizations from:

> (1) representing certain aliens except in cases of domestic violence, 1996 Budget § 504(a)(11)
> (2) claiming or collecting attorney's fees; 1996 Budget Act § 504(a)(13)
> (3) initiating or participating in a class action lawsuit, 1996 Budget § 504(a)(7)

Nor do these Constitutional rights prevent Congress from requiring that a written statement of facts be prepared by the legal aid organizations prior to initiating litigation or pre-litigations negotiations. 1996 Budget Act § 504(a)(8).

6. It is substantially likely that the restrictions which implicate constitutional rights imposed by Congress on the

use of Non-LSC Funds by or for the benefit of Plaintiffs represents an unconstitutional condition in violation of Plaintiffs' right under the First Amendment in that it conditions the availability of LSC funds on the agreement of Plaintiffs to relinquish their First Amendment rights as identified above. Such condition is not supported by a compelling interest.

7. It is substantially likely that the restrictions on the use of Non-LSC Funds are also unconstitutional in that they do not merely limit the use which can be made of LSC funds but place restrictions upon LSC grantees and affiliates of LSC grantees.

8. The restrictions on the use of Non-LSC Funds have had, and will continue to have, an immediate an significant adverse effect upon Plaintiffs' constitutionally protected rights as more fully described above. In the absence of a preliminary injunction, Plaintiffs will suffer irreparable injury which is not capable of redress through any other legal remedy.

9. There is strong public interest in maintaining an independent and effective judicial system and in assuring that the channels of government are open to people whose legal rights have been or may be adversely affected by government action. Therefore, the public interest will also be served by granting a preliminary injunction.

10. Defendant LSC will not suffer any substantial harm if a partial preliminary injunction is issued in that it will remain able to restrict and monitor the use of its own funds pending trial.

Appendix C

11. There is no risk of economic harm or damage to LSC in the event this injunction is wrongfully issued. Therefore, no security shall be required from Plaintiffs.

NOW, THEREFORE, based on the foregoing,

IT IS HEREBY ORDERED that, pending trial, Defendant LSC is enjoined from enforcing the following restrictions, but only to the extent that they relate to the use of Non-LSC Funds, of the Omnibus Consolidated Appropriations Act of Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009, § 502(a), of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, § 504(d)(1) which prohibit Plaintiffs from:

(1) advocating or opposing any reapportionment of a legislative, judicial or elective district on any level; 1996 Budget Act § 504(a)(1)
(2) influencing the "issuance, amendment, or revocation of any executive order"; 1996 Budget Section 504(a)(2)
(3) "attempt[ing] to influence any part of any adjudicatory proceeding of any Federal, State, or local agency," 1996 Budget § 504(a)(3)
(4) attempting "to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative . . . of the Congress or a State or a local legislative body" 1996 Budget Act (a)(4)
(5) litigating or lobbying in an effort to reform the federal or state welfare laws or systems, 1996 Budget § 504(a)(16)
(6) "conduct[ing] a training program for the purpose of advocating a particular public policy

or encouraging a political activity", 1996 Budget § 504(a)(12)
(7) "participating in any litigation on behalf of a person incarcerated in a Federal, State, or local prison", 1996 Budget Act § 504(a)(15)
(8) representing people allegedly engaged in certain illegal drug activity in public housing eviction proceedings, 1996 Budget Act § 504(a)(16)
(9) "participat[ing] in any litigation with respect to abortion", 1996 Budget Act § 504(a)(14). and regulations implementing these provisions that restrict plaintiffs' use of funds obtained from sources other than LSC.

DATED: Honolulu, Hawaii, Feb 14, 1997.

/s/
Chief United States District Judge

APPENDIX D

CONSTITUTION OF THE UNITED STATES

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX E

PUBLIC LAW 104-134 [H.R. 3019]; April 26, 1996

OMNIBUS CONSOLIDATED RESCISSIONS AND APPROPRIATIONS ACT OF 1996

For Signing Statement of Act, see p. 961-5.

An Act making appropriations for fiscal year 1996 to make a further downpayment toward a balanced budget, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 101. For programs, projects or activities in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996, provided as follows, to be effective as if it had been enacted into law as the regular appropriations Act:

AN ACT

Making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1996, and for other purposes.

Appendix E

TITLE I—DEPARTMENT OF JUSTICE

GENERAL ADMINISTRATION

SALARIES AND EXPENSES

For expenses necessary for the administration of the Department of Justice, $74,282,000; including not to exceed $3,317,000 for the Facilities Program 2000, and including $5,000,000 for management and oversight of Immigration and Naturalization Service activities, both sums to remain available until expended: *Provided*, That not to exceed 48 permanent positions and 55 full-time equivalent workyears and $7,477,000 shall be expended for the Department Leadership Program, exclusive of augmentation that occurred in these offices in fiscal year 1995: *Provided further*, That not to exceed 76 permanent positions and 90 full-time equivalent workyears and $9,487,000 shall be expended for the Offices of Legislative Affairs, Public Affairs and Policy Development: *Provided further*, That the latter three aforementioned offices shall not be augmented by personnel details, temporary transfers of personnel on either a reimbursable or non-reimbursable basis or any other type of formal or informal transfer or reimbursement of personnel or funds on either a temporary or long-term basis.

Appendix E

* * * *

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $278,000,000, of which $269,400,000 is for basic field programs and required independent audits carried out in accordance with section 509; $1,500,000 is for the Office of the Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients in accordance with section 509 of this Act; and S7,100,000 is for management and administration: Provided, That $198,750,000 of the total amount provided under this heading for basic field programs shall not be available except for the competitive award of grants and contracts under section 503 of this Act.

ADMINISTRATIVE PROVISIONS—LEGAL SERVICES CORPORATION

SEC. 501. (a) Funds appropriated under this Act to the Legal Services Corporation for basic field programs shall be distributed as follows:

> (1) The Corporation shall define geographic areas and make the funds available for each geographic area on a per capita basis relative to the number of individuals in poverty determined by the Bureau of the Census to be within the

geographic area, except as provided in paragraph (2)(B). Funds for such a geographic area may be distributed by the Corporation to 1 or more persons or entities eligible for funding under section 1006(a)(1)(A) of the Legal Services Corporation Act (42 U.S.C. 2996e(a)(1)(A)), subject to sections 502 and 504.

(2) Funds for grants from the Corporation, and contracts entered into by the Corporation for basic field programs, shall be allocated so as to provide—

(A) except as provided in subparagraph (B), an equal figure per individual in poverty for all geographic areas, as determined on the basis of the most recent decennial census of population conducted pursuant to section 141 of title 13, United States Code (or, in the case of the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, Alaska, Hawaii, and the United States Virgin Islands, on the basis of the adjusted population counts historically used as the basis for such determinations); and

(B) an additional amount for Native American communities that received assistance under the Legal Services Corporation Act for fiscal year 1995, so that the proportion of the funds appropriated to the Legal Services Corporation for basic field programs for fiscal year 1996 that is received

by the Native American communities shall be not less than the proportion of such funds appropriated for fiscal year 1995 that was received by the Native American communities.

(b) As used in this section:

(1) The term "individual in poverty" means an individual who is a member of a family (of i or more members) with an income at or below the poverty line.

(2) The term "poverty line" means the poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2)) applicable to a family of the size involved.

SEC. 502. None of the funds appropriated in this Act to the Legal Services Corporation shall be used by the Corporation to make a grant, or enter into a contract, for the provision of legal assistance unless the Corporation ensures that the person or entity receiving funding to provide such legal assistance is-

(1) a private attorney admitted to practice in a State or the District of Columbia;

(2) a qualified nonprofit organization, chartered under the laws of a State or the District of Columbia, that-

(A) furnishes legal assistance to eligible clients; and

(B) is governed by a board of directors or other governing body, the majority of which is comprised of attorneys who—

(i) are admitted to practice in a State or the District of Columbia; and

(ii) are appointed to terms of office on such board or body by the governing body of a State, county. or municipal bar association, the membership of which represents a majority of the attorneys practicing law in the locality in which the organization is to provide legal assistance;

(3) a State or local government (without regard to section 1006(a)(1)(A)(ii) of the Legal Services Corporation Act (42 U.S.C. 2996e(a)(1)(A)(ii)) or

(4) a substate regional planning or coordination agency that serves a substate area and whose governing board is controlled by locally elected officials.

SEC. 503. (a)(1) Not later than April 1, 1996, the Legal Services Corporation shall implement a system of competitive awards of grants and contracts for all basic field programs, which shall apply to all such grants and contracts

awarded by the Corporation after March 31, 1996, from funds appropriated in this Act.

(2) Any grant or contract awarded before April 1, 1996, by the Legal Services Corporation to a basic field program for 1996—

(A) shall not be for an amount greater than the amount required for the period ending March 31, 1996;

(B) shall terminate at the end of such period; and

(C) shall not be renewable except in accordance with the system implemented under paragraph (1).

(3) The amount of grants and contracts awarded before April 1,1996, by the Legal Services Corporation for basic field programs for 1996 in any geographic area described in section 501 shall not exceed an amount equal to 3/12 of the total amount to be distributed for such programs for 1996 in such area.

Regulations. (b) Not later than 60 days after the date of enactment of this Act, the Legal Services Corporation shall promulgate regulations to implement a competitive selection process for the recipients of such grants and contracts.

(c) Such regulations shall specify selection criteria for the recipients, which shall include—

(1) a demonstration of a full understanding of the basic legal needs of the eligible clients to be served and a demonstration of the capability of serving the needs;

(2) the quality, feasibility, and cost effectiveness of a plan submitted by an applicant for the delivery of legal assistance to the eligible clients to be served; and

(3) the experience of the Legal Services Corporation with the applicant, if the applicant has previously received financial assistance from the Corporation, including the record of the applicant of past compliance with Corporation policies, practices. and restrictions.

Publication. (d) Such regulations shall ensure that timely notice regarding an opportunity to submit an application for such an award is published in periodicals of local and State bar associations and in at least 1 daily newspaper of general circulation in the area to be served by the person or entity receiving the award.

(e) No person or entity that was previously awarded a grant or contract by the Legal Services Corporation for the provision of legal assistance may be given any preference in the competitive selection process.

(f) For the purposes of the funding provided in this Act, rights under sections 1007(a)(9) and 1011 of the Legal Services Corporation Act (42 U.S.C. 2996(a)(9) and 42 U.S.C. 2996j) shall not apply.

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SEC. 504. (a) None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a "recipient")—

(1) that makes available any funds, personnel, or equipment for use in advocating or opposing any plan or proposal, or represents any party or participates in any other way in litigation, that is intended to or has the effect of altering, revising, or reapportioning a legislative, judicial, or elective district at any level of government, including influencing the timing or manner of the taking of a census;

(2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency;

(3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect;

(4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body;

(5) that attempts to influence the conduct of oversight proceedings of the Corporation or any person or entity receiving financial assistance provided by the Corporation;

(6) that pays for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, administrative expense, or related expense, associated with an activity prohibited in this section;

(7) that initiates or participates in a class action suit;

(8) that files a complaint or otherwise initiates or participates in litigation against a defendant, or engages in a precomplaint settlement negotiation with a prospective defendant, unless—

(A) each plaintiff has been specifically identified, by name, in any complaint filed for purposes of such litigation or prior to the precomplaint settlement negotiation; and

(B) a statement or statements of facts written in English and, if necessary, in a language that the plaintiffs understand, that enumerate the particular facts known to the plaintiffs on which the complaint is based, have been signed by the plaintiffs, are kept on file by the recipient, and are made available to any Federal department or agency that is

auditing or monitoring the activities of the Corporation or of the recipient, and to any auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation:

Provided, That upon establishment of reasonable cause that an injunction is necessary to prevent probable, serious harm to such potential plaintiff, a court of competent jurisdiction may enjoin the disclosure of the identity of any potential plaintiff pending the outcome of such litigation or negotiations after notice and an opportunity for a hearing is provided to potential parties to the litigation or the negotiations: *Provided further*, That other parties to the litigation or negotiation shall have access to the statement of facts referred to in subparagraph (B) only through the discovery process after litigation has begun;

(9) unless—

(A) prior to the provision of financial assistance—

(i) if the person or entity is a nonprofit organization, the governing board of the person or entity has set specific priorities in writing, pursuant to section 1007(a)(2)(C)(i) of the Legal Services

Appendix E

Corporation Act (42 U.S.C. 2996f(a)(2)(C)(i)), of the types of matters and cases to which the staff of the nonprofit organization shall devote time and resources; and

(ii) the staff of such person or entity has signed a written agreement not to undertake cases or matters other than in accordance with the specific priorities set by such governing board, except in emergency situations defined by such board and in accordance with the written procedures of such board for such situations; and

(B) the staff of such person or entity provides to the governing board on a quarterly basis, and to the Corporation on an annual basis, information on all cases or matters undertaken other than cases or matters undertaker. in accordance with such priorities;

(10) unless—

(A) prior to receiving the financial assistance, such person or entity agrees to maintain records of time spent on each case or matter with respect to which the person or entity is engaged;

(B) any funds, including Interest on Lawyers Trust Account funds, received from a

source other than the Corporation by the person or entity, and disbursements of such funds, are accounted for and reported as receipts and disbursements, respectively, separate and distinct from Corporation funds; and

(C) the person or entity agrees (notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)) to make the records described in this paragraph available to any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and to any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation;

(11) that provides legal assistance for or on behalf of any alien, unless the alien is present in the United States and is—

(A) an alien lawfully admitted for permanent residence as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20));

(B) an alien who—

(i) is married to a United States citizen or is a parent or an unmarried child under the age of 21 years of such a citizen; and

(ii) has filed an application to adjust the status of the alien to the status of a lawful permanent resident under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), which application has not been rejected;

(C) an alien who is lawfully present in the United States pursuant to an admission under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157) (relating to refugee admission) or who has been granted asylum by the Attorney General under such Act;

(D) an alien who is lawfully present in the United States as a result of withholding of deportation by the Attorney General pursuant to section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h));

(E) an alien to whom section 305 of the Immigration Reform and Control Act of 1986 (8 U.S.C. 1101 note) applies, but only to the extent that the legal assistance provided is the legal assistance described in such section; or

(F) an alien who is lawfully present in the United States as a result of being granted

conditional entry to the United States before April 1, 1980, pursuant to section 203(a)(7) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(7)), as in effect on March 31, 19S0, because of persecution or fear of persecution on account of race, religion, or political calamity;

(12) that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration, including the dissemination of information about such a policy or activity, except that this paragraph shall not be construed to prohibit the provision of training to an attorney or a paralegal to prepare the attorney or paralegal to provide—

(A) adequate legal assistance to eligible clients; or

(B) advice to any eligible client as to the legal rights of the client;

(13) that claims (or whose employee, claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees;

(14) that participates in any litigation with respect to abortion;

(15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison;

(16) that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation:

Public housing. (17) that defends a person in a proceeding to evict the person from a public housing project if —

(A) the person has been charged with the illegal sale or distribution of a controlled substance: and

(B) the eviction proceeding is brought by a public housing agency because the illegal drug activity of the person threatens the health or safety of another tenant residing in the public housing project or employee of the public housing agency;

(18) unless such person or entity agrees that the person or entity, and the employees of the

person or entity, will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action, and will not refer such nonattorney to another person or entity or an employee of the person or entity, that is receiving financial assistance provided by the Corporation; or

(19) unless such person or entity enters into a contractual agreement to be subject to all provisions of Federal law relating to the proper use of Federal funds, the violation of which shall render any grant or contractual agreement to provide funding null and void, and, for such purposes, the Corporation shall be considered to be a Federal agency and all funds provided by the Corporation shall be considered to be Federal funds provided by grant or contract.

(b) Nothing in this section shall be construed to prohibit a recipient from using funds from a source other than the Legal Services Corporation for the purpose of contacting, communicating with, or responding to a request from, a State or local government agency, a State or local legislative body or committee, or a member thereof, regarding funding for the recipient, including a pending or proposed legislative or agency proposal to fund such recipient.

(c) Not later than 30 days after the date of enactment of this Act, the Legal Services Corporation shall promulgate a suggested list of priorities that boards of directors may use in setting priorities under subsection (a)(9).

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(d)(1) The Legal Services Corporation shall not accept any non-Federal funds, and no recipient shall accept funds from any source other than the Corporation, unless the Corporation or the recipient. as the case may be, notifies in writing the source of the funds that the funds may not be expended for any purpose prohibited by the Legal Services Corporation Act or this title.

(2) Paragraph (1) shall not prevent a recipient from—

(A) receiving Indian tribal funds (including funds from private nonprofit organizations for the benefit of Indians or Indian tribes) and expending the tribal funds in accordance with the specific purposes for which the tribal funds are provided; or

(B) using funds received from a source other than the Legal Services Corporation to provide legal assistance to a covered individual if such funds are used for the specific purposes for which such funds were received, except that such funds may not be expended by recipients for any purpose prohibited by this Act or by the Legal Services Corporation Act.

(e) Nothing in this section shall be construed to prohibit a recipient from using funds derived from a source other than the Legal Services Corporation to comment on public rulemaking or to respond to a written request for information or testimony from a Federal, State or local agency, legislative body or committee, or a member of such an agency, body, or committee, so long as the response is made only to the parties

that make the request and the recipient does not arrange for the request to be mace.

(f) As used in this section:

(1) The term "controlled substance" has the meaning given the term in section 102 of the Controlled Substances Act (21 U.S.C. 802).

(2) The term "covered individual" means any person who—

(A) except as provided in subparagraph (B), meets the requirements of this Act and the Legal Services Corporation Act relating to eligibility for legal assistance; and

(B) may or may not be financially unable to afford legal assistance.

(3) The term "public housing project" has the meaning as used within, and the term "public housing agency" has the meaning given the term, in section 3 of the United States Housing Act of 1937 (42 U.S.C. 1437a).

SEC. 505. None of the funds appropriated in this Act to the Legal Services Corporation or provided by the Corporation to any entity or person may be used to pay membership dues to any private or nonprofit organization.

SEC. 506. None of the funds appropriated in this Act to the Legal Services Corporation may be used by any person or

entity receiving financial assistance from the Corporation to file or pursue a lawsuit against the Corporation.

SEC. 507. None of the funds appropriated in this Act to the Legal Services Corporation may be used for any purpose prohibited or contrary to any of the provisions of authorization legislation for fiscal year 1996 for the Legal Services Corporation that is enacted into law. Upon the enactment of such Legal Services Corporation reauthorization legislation, funding provided in this Act shall from that date be subject to the provisions of that legislation and any provisions in this Act that are inconsistent with that legislation shall no longer have effect.

SEC. 508. (a) The requirements of section 504 shall apply to the activities of a recipient described in section 504, or an employee of such a recipient, during the provision of legal assistance for a case or matter, if the recipient or employee begins to provide the legal assistance on or after the date of enactment of this Act.

(b) If the recipient or employee began to provide legal assistance for the case or matter prior to the date of enactment of this Act—

(1) each of the requirements of section 504 (other than paragraphs (7), (11), (13), and (15) of subsection a) of such section) shall, beginning on the date of enactment of this Act, apply to the activities of the recipient or employee during the provision of legal assistance for the case or matter;

(2) the requirements of paragraphs (7), (11). and (15) of section 504(a) shall apply—

(A) beginning on the date of enactment of this Act, to the activities of the recipient or employee during the provision of legal assistance for any additional related claim for which the recipient or employee begins to provide legal assistance on or after such date; and

(B) beginning August 1, 1996, to all other activities of the recipient or employee during the provision of legal assistance for the case or matter; and

(3) the requirements of paragraph (13) of section 504(a)—

(A) shall apply beginning on the date of enactment of this Act to the activities of the recipient or employee during the provision of legal assistance for any additional related claim for which the recipient or employee begins to provide legal assistance on or after such date; and

(B) shall not apply to all other activities of the recipient or employee during the provision of legal assistance for the case or matter.

Reports. (c) The Legal Services Corporation shall, every 60 days, submit to the Committees on Appropriations of the

Senate and House of Representatives a report setting forth the status of cases and matters referred to in subsection (b)(2).

Audits. SEC. 509. (a) An audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act (referred to in this section as a "recipient") shall be conducted in accordance with generally accepted government auditing standards and guidance established by the Office of the Inspector General and shall report whether—

(1) the financial statements of the recipient present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

(2) the recipient has internal control systems to provide reasonable assurance that it is managing funds, regardless of source, in compliance with Federal laws and regulations; and

(3) the recipient has complied with Federal laws and regulations applicable to funds received, regardless of source.

(b) In carrying out the requirements of subsection (a)(3), the auditor shall select and test a representative number of transactions and report all instances of noncompliance to the recipient. The recipient shall report in writing any noncompliance found by the auditor during the audit under this section within 5 business days to the Office of the Inspector General and shall provide a copy of the report

simultaneously to the auditor. If the recipient fails to report the noncompliance, the auditor shall report the noncompliance directly to the Office of the Inspector General within 5 business days of the recipient's failure to report. The auditor shall not be liable in a private action for any finding, conclusion, or statement expressed in a report made pursuant to this section.

(c) The audits required under this section shall be provided for by the recipients and performed by independent public accountants. The cost of such audits shall be shared on a pro rata basis among all of the recipient's funding providers and the appropriate share shall be an allowable charge to the Federal funds provided by the Legal Services Corporation. No audit costs may be charged to the Federal funds when the audit required by this section has not been made in accordance with the guidance promulgated by the Office of the Inspector General.

If the recipient fails to have an acceptable audit in accordance with the guidance promulgated by the Office of the Inspector General, the following sanctions shall be available to the Corporation as recommended by the Office of the Inspector General:

(1) The withholding of a percentage of the recipient's funding until the audit is completed satisfactorily.

(2) The suspension of recipient's funding until an acceptable audit is completed.

(d) The Office of the Inspector General may remove, suspend, or bar an independent public accountant, upon a showing of good cause, from performing audit services required by this section. Any such action to remove, suspend, or bar an auditor shall be only after notice to the auditor and an opportunity for hearing. The Office of the Inspector General shall develop and issue rules of practice to implement this paragraph.

(e) Any independent public accountant performing an audit under this section who subsequently ceases to be the accountant for the recipient shall promptly notify the Office of the Inspector General pursuant. to such rules as the Office of the Inspector General shall prescribe.

(f) Audits conducted in accordance with this section shall be in lieu of the financial audits otherwise required by section 1009(c) of the Legal Services Corporation Act (42 U.S.C. 2996h(c)).

(g) The Office of the Inspector General is authorized to conduct on-site monitoring, audits, and inspections in accordance with Federal standards.

(h) Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)), financial records, time records, retainer agreements,. client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or

monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney-client privilege.

(i) The Legal Services Corporation shall not disclose any name or document referred to in subsection (h), except to—

(1) a Federal, State, or local law enforcement official; or

(2) an official of an appropriate bar association for the purpose of enabling the official to conduct an investigation of a rule of professional conduct.

(j) The recipient management shall be responsible for expeditiously resolving all reported audit reportable conditions, findings, and recommendations, including those of sub-recipients.

(k) The Legal Services Corporation shall—

(1) follow up on significant reportable conditions. findings, and recommendations found by the independent public accountants and reported to Corporation management by the Office of the Inspector General to ensure that instances of deficiencies and noncompliance are resolved in a timely manner, and

(2) Develop procedures to ensure effective follow-up that meet at a minimum the

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requirements of Office of Management and Budget Circular Number A-50.

(l) The requirements of this section shall apply to a recipient for its first fiscal year beginning on or after January 1, 1996.

APPENDIX F

PUBLIC LAW 104-208 [H.R. 3610]; September 30, 1996

OMNIBUS CONSOLIDATED APPROPRIATIONS ACT, 1997

For Signing Statement of Act, see p. 3388.

An Act making omnibus consolidated appropriations for the fiscal year ending September 30, 1997, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DIVISION A

That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the several departments, agencies, corporations and other organizational units of the Government for the fiscal year 1997, and for other purposes, namely:

TITLE I—OMNIBUS APPROPRIATIONS

Sec. 101. (a) For programs, projects or activities in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1997, provided as follows, to be effective as if it had been enacted into law as the regular appropriations Act:

Appendix F

AN ACT

Making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1997, and for other purposes.

TITLE I - DEPARTMENT OF JUSTICE
GENERAL ADMINISTRATION
SALARIES AND EXPENSES

For expenses necessary for the administration of the Department of Justice, $75,773,000 of which not to exceed $3,317,000 is for the Facilities Program 2000, to remain available until expended: *Provided*, That not to exceed 43 permanent positions and 44 full-time equivalent workyears and $7,477,000 shall be expended for the Department of Leadership Program exclusive of augmentation that occurred in these offices in fiscal year 1996: *Provided further*, That not to exceed 41 permanent positions and 48 full-time equivalent workyears and $4,660,000 shall be expended for the Offices of Legislative Affairs and Public Affairs:

* * * * *

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended $283,000,000 of which $274,400,000 is for

basic field programs and required independent audits; $1,500,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients: and $7,100,000 is for management and administration.

ADMINISTRATIVE PROVISIONS—LEGAL SERVICES CORPORATION

SEC. 501. (a) CONTINUATION OF COMPETITIVE SELECTION PROCESS.—None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity except through a competitive selection process conducted in accordance with regulations promulgated by the Corporation in accordance with the criteria set forth in subsections (c), (d), and (e) of section 503 of Public Law 104-134 (110 Stat. 1321-52 et seq.).

(b) INAPPLICABILITY OF NONCOMPETITIVE PROCEDURES.—For purposes of the funding provided in this Act, rights under sections 1007(a)(9) and 1011 of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(9) and 42 U.S.C. 2996j) shall not apply.

SEC. 502. (a) CONTINUATION OF REQUIREMENTS AND RESTRICTIONS.—None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of—

(1) sections 501, 502, 505, 506, and 507 of Public Law 104-134 (110 Stat. 1321-51 et seq.),

and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions as set forth in such sections, except that all references in such sections to 1995 and 1996 shall be deemed to refer instead to 1996 and 1997, respectively; and

(2) section 504 of Public Law 104-134 (110 Stat. 1321-53 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section, except that—

(A) subsection (c) of such section 504 shall not apply;

(B) paragraph (3) of section 508(b) of Public Law 104-134 (110 Stat. 1321-58) shall apply with respect to the requirements of subsection (a)(13) of such section 504, except that all references in such section 508(b) to the date of enactment shall be deemed to refer to April 26, 1996; and

(C) subsection (a)(11) of such section 504 shall not be construed to prohibit a recipient from using funds derived from a source other than the Corporation to provide related legal assistance to—

(i) an alien who has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a

member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty; or

(ii) an alien whose child has been battered or subjected to extreme cruelty in the United States by a spouse or parent of the alien (without the active participation of the alien in the battery or extreme cruelty), or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty.

(b) DEFINITIONS.—For purposes of subsection (a)(2)(C):

(1) The term "battered or subjected to extreme cruelty" has the meaning given such term under regulations issued pursuant to subtitle G of the Violence Against Women Act of 1994 (Pub. L. 103-322; 108 Stat. 1953).

(2) The term "related legal assistance" means legal assistance directly related to the prevention of, or obtaining of relief from, the battery or cruelty described in such subsection.

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SEC. 503. (a) CONTINUATION OF AUDIT REQUIREMENTS.—The requirements of section 509 of Public Law 104-134 (110 Stat. 1321-58 et seq.), other than subsection (1) of such section, shall apply during fiscal year 1997.

(b) REQUIREMENT OF ANNUAL AUDIT.—An annual audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act shall be conducted during fiscal year 1997 in accordance with the requirements referred to in subsection (a).

APPENDIX G

PUBLIC LAW 105-119

111 STAT. 2510

DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS ACT, 1998

An Act making appropriations for the Department of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1998, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 1998, and for other purposes, namely:

TITLE I—DEPARTMENT OF JUSTICE

GENERAL ADMINISTRATION

SALARIES AND EXPENSES

For expenses necessary for the administration of the Department of Justice, $76,199,000, of which not to exceed $3,317,000 is for the Facilities Program 2000, to remain available until expended: *Provided*, That not to exceed 43 permanent positions and 44 full-time equivalent workyears and $7,860,000 shall be expended for the Department Leadership Program exclusive of augmentation that occurred

in these offices in fiscal year 1997: *Provided further*, That not to exceed 41 permanent positions and 48 full-time equivalent workyears and $4,660,000 shall be expended for the Offices of Legislative Affairs and Public Affairs: *Provided further*, That the latter two aforementioned offices shall not be augmented by personnel details, temporary transfers of personnel on either a reimbursable or non-reimbursable basis or any other type of formal or informal transfer or reimbursement of personnel or funds on either a temporary or long-term basis.

* * * * *

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $283,000,000, of which $274,400,000 is for basic field programs and required independent audits; $1,500,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $7,100,000 is for management and administration.

ADMINISTRATIVE PROVISIONS—LEGAL SERVICES CORPORATION

SEC. 501. (a) CONTINUATION OF COMPETITIVE SELECTION PROCESS.—None of the funds appropriated in this Act to the Legal Services Corporation may be used to

provide financial assistance to any person or entity except through a competitive selection process conducted in accordance with regulations promulgated by the Corporation in accordance with the criteria set forth in subsections (c), (d), and (e) of section 503 of Public Law 104-134 (110 Stat. 1321-52 et seq.).

(b) INAPPLICABILITY OF CERTAIN PROCEDURES.—Section 1007(a)(9) and 1011 of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(9) and 2996j) shall not apply to the provision, denial, suspension, or termination of any financial assistance using funds appropriated in this Act.

(c) ADDITIONAL PROCEDURES.—If, during any term of a grant or contract awarded to a recipient by the Legal Services Corporation under the competitive selection process referred to in subsection (a) and applicable Corporation regulations, the Corporation finds, after notice and opportunity for the recipient to be heard, that the recipient has failed to comply with any requirement of the Legal Services Corporation Act (42 U.S.C. 2996 et seq.), this Act, or any other applicable law relating to funding for the Corporation, the Corporation may terminate the grant or contract and institute a new competitive selection process for the area served by the recipient, notwithstanding the terms of the recipient's grant or contract.

SEC. 502. (a) CONTINUATION OF REQUIREMENTS AND RESTRICTIONS.—None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of—

(1) sections 501, 502, 505, 506, and 507 of Public Law 104-134 (110 Stat. 1321-51 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions as set forth in such sections, except that all references in such sections to 1995 and 1996 shall be deemed to refer instead to 1997 and 1998, respectively; and

(2) section 504 of Public Law 104-134 (110 Stat. 1321-53 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section, except that—

(A) subsection (c) of such section 504 shall not apply;

(B) paragraph (3) of section 508(b) of Public Law 104-134 (110 Stat. 1321-58) shall apply with respect to the requirements of subsection (a)(13) of such section 504, except that all references in such section 508(b) to the date of enactment shall be deemed to refer to April 26, 1996; and

(C) subsection (a)(11) of such section 504 shall not be construed to prohibit a recipient from using funds derived from a source other than the Corporation to provide related legal assistance to—

(i) an alien who has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty; or

(ii) an alien whose child has been battered or subjected to extreme cruelty in the United States by a spouse or parent of the alien (without the active participation of the alien in the battery or extreme cruelty), or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty.

(b) DEFINITIONS.—For purposes of subsection (a)(2)(C):

(1) The terms "battered or subjected to extreme cruelty" has the meaning given such term under regulations issued pursuant to subtitle G of the Violence against Women Act of 1994 (Public Law 103-322; 108 Stat. 1953).

(2) The term "related legal assistance" means legal assistance directly related to the prevention

of, or obtaining of relief from, the battery or cruelty described in such subsection.

SEC. 503. (a) CONTINUATION OF AUDIT REQUIREMENTS.—The requirements of section 509 of Public Law 104-134 (110 Stat. 1321-58 et seq.), other than subsection (1) of such section, shall apply during fiscal year 1998.

(b) REQUIREMENT OF ANNUAL AUDIT.—An annual audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act shall be conducted during fiscal year 1998 in accordance with the requirements referred to in subsection (a).

SEC. 504. (a) DEBARMENT.—The Legal Services Corporation may debar a recipient, on a showing of good cause, from receiving an additional award of financial assistance form the Corporation. Any such action to debar a recipient shall be instituted after the Corporation provides notice and an opportunity for a hearing to the recipient.

(b) REGULATIONS.—The Legal Services Corporation shall promulgate regulations to implement this section.

(c) GOOD CAUSE.—In this section, the term "good cause", used with respect to debarment, includes—

(1) prior termination of the financial assistance of the recipient, under part 1640 of title 45, Code of Federal Regulations (or any similar corresponding regulation or ruling);

(2) prior termination in whole, under part 1606 of title 45, Code of Federal Regulations (or any similar corresponding regulation or ruling), of the most recent financial assistance received by the recipient, prior to date of the debarment decision;

(3) substantial violation by the recipient of the statutory or regulatory restrictions that prohibit recipients from using financial assistance made available by the Legal Services Corporation or other financial assistance for purposes prohibited under the Legal Services Corporation Act (42 U.S.C. 2996 et seq.) or for involvement in any activity prohibited by, or inconsistent with, section 504 of Public Law 104-134 (110 Stat. 1321-53 et seq.), section 502(a)(2) of Public Law 104-208 (110 Stat. 3009-59 et seq.), or section 502(a)(2) of this Act;

(4) knowing entry by the recipient into a subgrant, subcontract, or other agreement with an entity that had been debarred by the Corporation; or

(5) the filing of a lawsuit by the recipient, on behalf of the recipient, as part of any program receiving any Federal funds, naming the Corporation, or any agency or employee of a Federal, State, or local government, as a defendant.

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SEC. 505. (a) Not later than January 1, 1998, the Legal Services Corporation shall implement a system of case information disclosure which shall apply to all basic field programs which receive funds from the Legal Services Corporation from funds appropriated in this Act.

(b) Any basic field program which receives Federal funds from the Legal Services Corporation from funds appropriated in this Act must disclose to the public in written form, upon request, and to the Legal Services Corporation in semiannual reports, the following information about each case filed by its attorneys in any court:

(1) The name and full address of each party to the legal action unless such information is protected by an order or rule of a court or by State or Federal law or revealing such information would put the client of the recipient of such Federal funds at risk of physical harm.

(2) The cause of action in the case.

(3) The name and address of the court in which the case was filed and the case number assigned to the legal action.

(c) The case information disclosed in semiannual reports to the Legal Services Corporation shall be subject to disclosure under section 552 of title 5, United States Code.

SEC. 506. In establishing the income or assets of an individual who is a victim of domestic violence, under section 1007(a)(2) of the Legal Services Corporation Act (42

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U.S.C. 2996f(a)(2)), to determine if the individual is eligible for legal assistance, a recipient described in such section shall consider only the assets and income of the individual, and shall not include any jointly held assets.

APPENDIX H

LEGAL SERVICES CORPORATION

45 CFR Part 1610

Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity

AGENCY:

Legal Services Corporation.

ACTION:

Final rule.

SUMMARY:

This final rule revises the Legal Services Corporation's ("Corporation" or "LSC") interim rule concerning the use of non-LSC funds by LSC recipients. The revisions are intended to address constitutional challenges while ensuring that no LSC-funded entity engages in restricted activities. This final rule continues the interim rule's deletion of the provisions on transfers of non-LSC funds and revises the interim rule's new section that sets out standards for the integrity of recipient programs. The final rule also makes several conforming revisions, including changes to definitions and section titles.

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EFFECTIVE DATE:

This final rule is effective June 2, 1997.

FOR FURTHER INFORMATION CONTACT:

Office of the General Counsel, (202) 336-8817.

SUPPLEMENTARY INFORMATION:

On December 2, 1996, the Corporation published a completely revised final rule to implement Section 504 in the Corporation's FY 1996 appropriations act, Public Law 104-134. 110 Stat. 1321 (1996), as incorporated by the Corporation's FY 1997 appropriations act. Public Law 104-208, 110 Stat. 3009. Section 504 applies certain restrictions to any person or entity receiving LSC funds, effectively restricting the use of virtually all of a recipient's funds to the same degree that it restricts LSC funds. Although not required to by law, the Corporation extended the restrictions on a recipient's funds to a transfer of a recipient's non-LSC funds. Thus, the rule required that when a recipient transferred its non-LSC funds to an entity that had no LSC funds, the conditions would remain attached to the transferred funds. However, the other funds of the entity would not be affected.

In January 1987, five legal services recipients in Hawaii, Alaska. and California, together with two of their program lawyers, two non-federal funders and a client organization, filed suit in the United States District Court for the District of Hawaii challenging a number of the Section 504 restrictions as unconstitutional conditions on their use of

non-LSC funds. *Legal Aid Society of Hawaii et al. v. Legal Services Corporation*, Civil Action No. 97-00032 ACK, (hereinafter referred to as *LASH*). The Court entered an order on February 14, 1997, which preliminarily enjoined the Corporation from enforcing restrictions on the recipients' use of non-LSC funds for certain restrictions as to which the Court determined that the plaintiffs had a fair likelihood of demonstrating an infringement of First Amendment rights. (The Court denied the preliminary injunction request with respect to certain other restrictions, including those relating to class actions and representation of ineligible aliens.) The Court's preliminary ruling was grounded in pertinent part on its understanding of the Corporation's interrelated organization policy, but also implicated the expansive reach of the Corporation's restrictions on non-LSC funds. The effect of the preliminary order was to allow those recipients who are plaintiffs in the case to use their non-LSC funds to engage in certain prohibited activities within their recipient programs during the interim period before a trial on the merits and a final ruling by the judge.

A similar suit to *LASH* was also filed in January 1997, as a class action in the United States District Court for the Eastern District of New York, which sought, *inter alia*, to have the court declare certain restrictions unconstitutional and grant preliminary and final injunctive relief. *Velazquez et al. v. Legal Services Corporation*, 97 Civ. 00182(FB) (E.D.N.Y.). There has been no ruling or order issued to date.

Because the Court's order in *LASH* created a situation clearly at odds with Congressional intent, the Operations and Regulations Committee ("Committee") of the Corporation's Board of Directors ("Board") held public hearings and

considered a draft interim rule on March 7, 1997. The Committee recommended and the Board agreed on March 8, 1997, on an interim rule, which was published in the **Federal Register** on March 14, 1997, with a request for comments.

The interim rule revised the final rule with the intent of addressing the constitutional concerns raised in *LASH* while preserving the statutory system created by Congress that forbids recipients from engaging in prohibited activities and subsidizing prohibited activities with LSC funds. Generally. the interim rule deleted provisions in § 1610.7 on the transfer of non-LSC funds and added a new § 1610.8 dealing with the integrity of recipient programs. Section 1610.8 replaced and nullified Section 1-7 of the Corporation's 1986 Audit and Accounting Guide, which set out the Corporation's policy on interrelated organizations.

The Corporation received three timely comments and several other comments thereafter, each of which was given careful consideration. Based on the comments and its own internal research and review, the Corporation has made several revisions to the interim rule. A section-by-section analysis of this final rule is provided below. The analysis includes explanations of provisions in the December 1996 final rule that remain unchanged by the interim or this final rule.

Section 1610.1 Purpose

The purpose section is intended to reflect Congressional intent that no LSC-funded organization engage in any restricted activities. This final rule adds language clarifying that the purpose of the rule is to ensure that recipients

maintain objective integrity and independence from organizations that engage in restricted activities. The term "restricted activities" is used in the preamble and text of this rule as an umbrella term to refer to the restrictions included in the definitions of "purpose prohibited by the LSC Act" and "activity prohibited by or inconsistent with Section 504."

Section 1610.1 Definitions

This section provides definitions for terms used in this part. Paragraph (a) defines "purpose prohibited by the LSC Act." The December 1996 final rule revised the Corporation's longstanding definition in several ways. This rule deleted reference to a prohibition on the representation of juveniles, because the prohibition is no longer in the LSC Act. This rule also deleted reference to those restrictions on activities in the LSC Act that are now included in the broader restrictions in the Corporation's appropriations act. Numbering changes were also made to conform to 1977 amendments to the LSC Act. These changes have been retained in this rule.

Paragraph (b) defines "activity prohibited by or inconsistent with Section 504" by listing the prohibitions and requirements in Section 504 of the Corporation's FY 1996 appropriations which have been incorporated by reference in the Corporation's FY 1997 appropriations act. These prohibitions and requirements apply to a recipient's activities, regardless of the source of funding. The definition also makes reference to subsections 504(b) and 504(e), which provide exceptions for specific activities supported by non-LSC funds.

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This section also includes definitions of "IOLTA funds," "non-LSC funds," "private funds," "public funds," and "tribal funds." No changes in these definitions have been made by this rule.

Changes have been made to the definition of "transfer" to help clarify the meaning of the term and to reflect the deletion of the provisions on transfers of non-LSC funds. Minor changes were made to the first sentence of the definition to clarify that a "transfer" includes payments of LSC funds by a recipient to a person or entity for programmatic activities normally conducted by the recipient, such as the representation of eligible clients. A second sentence is added to clarify what is not included in the term. The additional language provides that a "transfer" does not include payments of LSC funds to vendors, accountants or other providers of goods and services in the normal course of business. The term is now found in the section on program integrity as well as in the section on transfers of LSC funds.

Section 1610.3 Prohibition

This section sets out the prohibition which states that recipients may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with Section 504, unless authorized by other provisions in this part.

Section 1610.4 Authorized Use of Non-LSC Funds

This section sets out the circumstances where the restrictions in Section 504 and the LSC Act do not apply to certain categories of a recipient's non-LSC funds. Generally,

pursuant to § 1010(c) of the LSC Act, the restrictions in the LSC Act apply to a recipient's LSC and private funds but do not apply to a recipient's public or tribal funds if they are used for the purposes for which they are provided. Restrictions in Section 504, however, generally apply to all of a recipient's funds, including public funds. Paragraph (a) clarifies that, under the LSC Act and Section 504, tribal funds may be used for the purposes for which they were provided. Paragraph (b) clarifies that a recipient's public funds are not subject to the restrictions in the LSC Act but are subject to those in Section 504. This section also states that "IOLTA funds" are to be treated the same as public funds. Because a recipient's private funds are subject to the restrictions in both the LSC Act and Section 504, paragraph (c) clarifies that private funds may be used for the purposes for which they were provided, as long as such use is consistent with the restrictions in the LSC Act and Section 504. Finally, paragraph (d) implements an exception in Section 504 which allows recipients to use non-LSC funds for financially ineligible clients, as long as the funds are used for the specific purpose for which they were received and are not used in a manner that violates the LSC Act or Section 504.

Section 1610.5 Notification

This section incorporates the requirement of Section 504(d)(l) of the appropriations act that recipients may not accept funds from non-LSC sources unless they provide written notice to the funders that their funds may not be used in any manner inconsistent with the LSC Act or Section 504. The requirement applies only to cash contributions; recipients are not required to notify persons or organizations

who make non-cash donations or volunteer their time or services to the recipient.

The rule contains a *de minimis* exception which relieves recipients of the notice requirement for individual contributions of less than $250. This exception is keyed to the level which triggers the IRS reporting requirement. It is not intended to incorporate any IRS instructions and guidelines concerning contributions to charities. It simply recognizes that, because recipients must provide acknowledgments for donations of $250 or more for IRS purposes, it does not constitute any significant additional burden to incorporate the required notification into the acknowledgment.

Generally, notification should be provided before the recipient accepts the funds. Thus, notice should be given during the course of soliciting funds or applying for a grant or contract. However, for unsolicited donations where advance notice is not feasible, notice should be given in the recipients letter acknowledging the contribution. For contracts and grants awarded prior to the enactment of the restriction, notice should be given prior to acceptance by the recipient of any additional payments.

The notice requirement applies to funds received by recipients as grants, contracts or charitable donations from funders other than the Corporation, which are intended to fund the nonprofit work of the recipient. It does not include funds received from sources such as court payment to attorneys for their work under court appointments; nor does it include payments to the recipient for rent, bank interest, or sale of goods, such as manuals.

An exception is provided for tribal funds. The notice requirement would apply only when the tribal funds are in fact restricted. Thus, when a recipient receives tribal funds to which the restrictions do not apply, no notice is required to the source of the funds.

Section 1610.6 Applicability

This section addresses two distinct situations. First, paragraph (a) clarifies that the prohibitions on criminal proceedings, actions challenging criminal convictions, aliens or prisoner litigation do not apply to a recipient's or subrecipient's separately funded public defender programs or projects. The authority for this provision is found in Section 1010(c) of the LSC Act and is also based on the scope of certain restrictions in Section 504. The restrictions on representation of aliens and prisoners in Section 504 apply only to civil representation and thus do not prohibit criminal representation in public defender programs. Also, although the LSC Act prohibits LSC recipients from engaging in or using resources for any criminal representation, a narrow exception for separately funded public defender programs or projects is provided in Section 1010(c).

Paragraph (b) provides an exception for criminal or related cases accepted by a recipient or subrecipient pursuant to a court appointment.

Section 1610.7 Transfers of LSC Funds

This section addresses the applicability of the statutory restrictions listed in § 1610.2 (a) and (b) when a recipient transfers LSC funds to another person or entity. The statutory

restrictions on a recipient's funds in the LSC Act and the Corporation's current appropriations act do not address the applicability of these provisions when a recipient transfers its LSC funds to another person or entity. However, the Corporation has historically applied such provisions to transfers of a recipient's LSC funds. See 45 CFR parts 1627 and 1632 and Program Letter dated December 11, 1995. This policy reflects the intent of the Corporation that transfers of LSC funds not become a means to circumvent statutory restrictions on those funds.

Paragraph (a) provides that the restrictions listed in § 1610.2 (a) and (b) will apply to any LSC funds transferred to another person or entity as well as to the non-LSC funds of the person or entity receiving such funds. This requirement is based on the Corporation's interpretation of legislative intent that the statutory conditions on LSC funds attach to a recipient's non-LSC funds and that, in most situations, this should also be the case when LSC funds are transferred by a recipient to another person or entity. Otherwise, recipients would be able to avoid legislative intent by simply transferring their LSC funds to other persons or entities.

Paragraph (b) modifies this requirement in the areas of timekeeping and priorities. The statutory provisions on timekeeping and priorities are administrative requirements more appropriately applicable to a recipient's own use of its funds. The intent is to assure greater accountability for the recipient's use of its funds without imposing unnecessary administrative burdens. Thus, this section applies the administrative requirements on priorities and timekeeping only to the funds transferred and only to the extent to ensure accountability for those funds. The rule requires that entities

receiving a transfer of LSC funds must either use the funds consistent with the recipient's priorities or establish their own priorities for the use of the funds. In regard to timekeeping, the language tracks the statutory requirement so that entities that receive a transfer of LSC funds are required to maintain records of time spent on each case or matter undertaken with the funds transferred. However, they are not required to keep time in accordance with the Corporation's timekeeping regulation, 45 CFR part 1635.

Paragraph (c) provides an exception for a transfer of LSC funds to bar associations, *pro bono* programs, private attorneys or law firms, or other entities for the sole purpose of funding private attorney involvement activities (PAI) pursuant to 45 CFR part 1614. For such transfers, the restrictions or requirements would apply only to the LSC funds transferred and not to the other funds of the persons or entities listed in this paragraph.

The December 1996 final rule included provisions on the transfer of non-LSC funds. The interim rule deleted these provisions and included in the rule instead a new § 1610.8 on program integrity. The deleted provisions provided that non-LSC funds transferred by a recipient would be subject to the restrictions of this part, but that any other funds of the entity receiving such funds would not be subject to the restrictions.

Comments on the interim rule generally favored deleting the provisions, but suggested that the Corporation state affirmatively in the rule itself that non-LSC funds that are transferred are not subject to the restrictions. The Board determined that it is not necessary to include an affirmative statement of the effect of taking out the provisions. There is

no statutory provision requiring that a transfer of non-LSC funds be subject to LSC restrictions, and the fact that the provision has been deleted speaks for itself.

Section 1610.8 Program Integrity of Recipient

This section provides a standard for program integrity by requiring that recipients maintain objective integrity and independence from any organization that engages in restricted activities. The program integrity test in the interim rule was a 2-step process. Paragraph (a)(2) of § 1610.8 of the interim rule set out the first step by delineating the factors used to determine whether an affiliation existed between the recipient and another organization, such that the recipient would be found to control, be controlled by or be subject to common control by the other organization. The factors to determine control were taken almost verbatim from the Corporation's interrelated organization policy. If such an affiliation were found to exist under paragraph (a), then the recipient was required to comply with step 2. the program integrity test delineated in paragraph (b), so that the restrictions listed in this part would not apply to the affiliate organization. The second step of the program integrity test was fashioned after the program integrity standard found to be constitutional in *Rust v. Sullivan* by the Supreme Court, see 500 U.S. 173 (1991).

Most of the comments on the interim rule's first step (the interrelated organization policy) stated that the meaning of several of the factors to determine control was unclear. In addition, although paragraph (a) expressly stated that only one factor would be dispositive of control, the commenters also expressed confusion on this matter and suggested that

the determination of control should be based on the totality of the facts and not on the existence of any particular factor.

Based on the Corporation's review of the comments and its research and analysis of the factors of the interrelated organization policy, the Board decided to delete paragraph (a) in its entirety for the following reasons:

The purpose of the policy was to establish whether a relationship existed between the recipient and another organization, such that the recipient and the other organization actually operated as one, rather than two separate organizations. The Board determined that if a program is found to be in compliance with the second step of the program integrity test, there would be a sufficiently separate identity and operational independence from the recipient.

Based on comments from the Corporation's Office of Inspector General (OIG). the Board determined that the interim rule did not provide sufficient guidance regarding any relationship a recipient might have with another independent organization. Under the interim rule, a recipient could have a relationship with another organization in which no formal control of one organization by the other exists, but in which there is substantial sharing of non-LSC funds, office space, equipment and personnel. By deleting paragraph (a) and revising paragraph (b). the rule provides guidance regarding a recipient's relationship with any organization, independent or affiliated, that engages in restricted activities. At the same time, because the standards will allow control at the Board level, recipients will have an avenue through which to engage

in restricted activities as long as they comply with the program integrity standards.

Comments on the second step generally stated that the standards created substantial practical problems for recipients. They also said that the standards were unclear as to the strictness of each factor, whether any particular factor would be determinative and whether a determination of compliance with the standards would be based on the totality of the facts.

Having deleted the first step of the analysis on program integrity, the Board revised the. second step to stand alone without reference to the interrelated organization factors. In response to comments, this new paragraph (a) was further revised to clarify that a determination of compliance with the program integrity standard would require a case-by-case determination based on the totality of the facts. Paragraph (a) now provides that a recipient must have an objective integrity and independence from any organization that engages in prohibited activities. Whether a recipient will be found to have such objective integrity and independence will be based on three considerations.

First, paragraph (a)(1) provides that the other organization must be a separate legal entity. This factor was implied but not made explicit in the interim rule. This change is necessary to implement Congressional intent that a recipient as a legal entity may not engage in certain restricted activities, regardless of the source of funds. At the same time, the Corporation has fashioned a rule that does not foreclose a recipient from engaging in restricted activities

through another legally distinct organization, as long as the recipient meets this rule's program integrity standards.

Second, paragraph (a)(2) provides that the other organization must not receive any LSC funds and no LSC funds may subsidize restricted activities. In response to comments, the Board deleted the words "directly or indirectly" before "subsidize" because they elicited objections and provided unclear guidance. "Subsidize" includes a payment of LSC funds to support, in whole or in part, restricted activity conducted by another entity, or payment to another entity to cover overhead, in whole or in part, relating to a restricted activity. A recipient will be considered to be subsidizing the restricted activities of another organization if it provides the use of its LSC-funded resources to the organization without receiving a fair market price for such use. Thus, if a recipient makes an in-kind contribution, such as donated LSC-funded space or telephone services, to another organization, the donation would be a subsidy. However, this example is not intended to mean that a recipient may share resources as long as the recipient receives a fair payment. A recipient must also maintain an actual physical and financial separation as set out in paragraph (a)(3) of this section.

Third, under paragraph (a)(3), the recipient must maintain a physical and financial separation from the other organization. Mere bookkeeping is not enough and a determination of sufficient separation will be based on the totality of the facts. The factors include, but are not limited to, existence of separate personnel, existence of separate accounting and timekeeping records, degree of separation of facilities and extent of the use of facilities for restricted

work, and the extent to which indicia, such as signs, distinguish the recipient from the other organization. Whether the recipient meets the program integrity standard by having sufficient separation will be determined on a case-by-case basis, and each case will be determined on the totality of the facts and no one factor is intended to be determinative.[1]

Several commenters asked the Corporation to clarify whether the "program integrity" requirement would automatically fail to be satisfied if a particular factor, such as personnel or facilities, was not completely separate. Because the Corporation is adopting a case-by-case approach based on the totality of the circumstances, LSC does not believe that it would be appropriate or feasible to use this preamble to provide advisory opinions based on limited or incomplete information about a recipient's relationship with an organization involved in restricted activities. However, consistent with the Corporation's longstanding practice regarding compliance issues, individual recipients are welcome to submit all the relevant "program integrity" information and request a review by the Corporation of any existing or contemplated relationship with an organization that engages in restricted activities.

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[1] In response to certain comments construing or characterizing the separation-of-personnel factor as dispositive or absolute, the interpretation in this preamble, based on consideration of the totality of the circumstances, supersedes any arguably contrary or inconsistent interpretation provided by any individual LSC official prior to issuance of this final rule.

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Commenters on the practical problems raised by the standards argued for mere bookkeeping and appeared to say that use of LSC-funded facilities and equipment is necessary for a non-LSC organization to function and engage in prohibited activities. Some commenters stated that it is not financially possible to duplicate everything and that programs should be allowed to use a recipient's facilities, equipment or staff, as long as there is appropriate documentation and allocation of funds. The Board determined that such a situation would violate the Congressional requirement that entities it funds not engage in restricted activities. The rule requires "objective integrity and independence" which cannot be achieved by mere bookkeeping. Thus, determinations taking into account the physical and financial separation standards must ensure that there is no identification of the recipient with restricted activities and that the other organization is not so closely identified with the recipient that there might be confusion or misunderstanding about the recipient's involvement with or endorsement of prohibited activities.

The interim rule's requirement that the recipient's board approve the recipient's affiliation with another organization has been deleted and replaced by a requirement in paragraph (b) that each recipient's governing body certify to the Corporation within 180 days of the effective date of this rule that it is in compliance with the program integrity standards set out in this section. Thereafter, the governing body must certify on an annual basis that the recipient has maintained such compliance. This requirement is intended to ensure that a recipient's governing body has reviewed any relationships the recipient has with other organizations involved in restricted activities to assure compliance with the program

integrity standards. The Corporation will issue guidance regarding the form of certification and the records necessary to support such certification.

Section 1610.9 Accounting

This section sets out the general accounting requirement for recipients for their non-LSC funds. Currently, recipients are directed by the accounting guidance issued by the Corporation.

List of Subjects in 45 CFR Part 1610

Grant programs, Legal services.

For reasons set forth in the preamble, LSC revises 45 CFR Part 1610 to read as follows:

PART 1610—USE OF NON-LSC FUNDS, TRANSFERS OF LSC FUNDS, PROGRAM INTEGRITY

Sec.

1610.1 Purpose.
1610.2 Definitions.
1610.3 Prohibition.
1610.4 Authorized use of non-LSC funds.
1610.5 Notification.
1610.6 Applicability.
1610.7 Transfers of LSC funds.
1610.8 Program integrity of recipient.
1610.9 Accounting.

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Authority: 42 U.S.C. 2996i; Pub. L. 104-208, 110 Stat. 3009; Pub. L. 104-134, 110 Stat. 1321.

§ 1610.1 Purpose.

This part is designed to implement statutory restrictions on the use of non-LSC funds by LSC recipients and to ensure that no LSC-funded entity shall engage in any restricted activities and that recipients maintain objective integrity and independence from organizations that engage in restricted activities.

§ 1610.2 Definitions.

(a) *Purpose prohibited by the LSC Act* means any activity prohibited by the following sections of the LSC Act and those provisions of the Corporation's regulations that implement such sections of the Act:

(1) Sections 1006(d)(3), 1006(d)(4), 1007(a)(6), and 1007(b)(4) of the LSC Act and 45 CFR part 1608 of the LSC Regulations (Political activities);

(2) Section 1007(a)(10) of the LSC Act (Activities inconsistent with professional responsibilities);

(3) Section 1007(b)(1) of the LSC Act and 45 CFR part 1609 of the LSC regulations (Fee-generating cases);

(4) Section 1007(b)(2) of the LSC Act and 45 CFR part 1613 of the LSC Regulations (Criminal proceedings);

(5) Section 1007(b)(3) of the LSC Act and 45 CFR part 1615 of the LSC Regulations (Actions challenging criminal convictions);

(6) Section 1007(b)(7) of the LSC Act and 45 CFR part 1612 of the LSC Regulations (Organizing activities);

(7) Section 1007(b)(8) of the LSC Act (Abortions);

(8) Section 1007(b)(9) of the LSC Act (School desegregation); and

(9) Section 1007(b)(10) of the LSC Act (Violations of Military Selective Service Act or military desertion).

(b) *Activity prohibited by or inconsistent with Section 504* means any activity prohibited by, or inconsistent with the requirements of, the following sections of 110 Stat. 1321 (1996) and those provisions of the Corporation's regulations that implement those sections:

(1) Section 504(a)(1) and 45 CFR part 1632 of the LSC Regulations (Redistricting);

(2) Sections 504(a)(2) through (6), as modified by Sections 504(b) and (e), and 45 CFR

part 1612 of the LSC Regulations (Legislative and administrative advocacy);

(3) Section 504(a)(7) and 45 CFR part 1617 of the LSC Regulations (Class actions);

(4) Section 504(a)(8) and 45 CFR part 1636 of the LSC Regulations (Client identification and statement of facts);

(5) Section 504(a)(9) and 45 CFR part 1620 of the LSC Regulations (Priorities);

(6) Section 504(a)(10) and 45 CFR part 1635 of the LSC Regulations (Timekeeping);

(7) Section 504(a)(11) and 45 CFR part 1626 of the LSC Regulations (Aliens);

(8) Section 504(a)(12) and 45 CFR part 1612 of the LSC Regulations (Public policy training);

(9) Section 504(a)(13) and 45 CFR part 1642 of the LSC Regulations (Attorneys' fees);

(10) Section 504(a)(14) (Abortion litigation);

(11) Section 504(a)(15) and 45 CFR part 1637 of the LSC Regulations (Prisoner litigation);

(12) Section 504(a)(16), as modified by Section 504(e), and 45 CFR part 1639 of the LSC Regulations (Welfare reform);

(13) Section 504(a)(17) and 45 CFR part 1633 of the LSC Regulations (Drug-related evictions); and

(14) Section 504(a)(18) and 45 CFR part 1638 of the LSC Regulations (In-person solicitation).

(c) *IOLTA funds* means funds derived from programs established by State court rules or legislation that collect and distribute interest on lawyers' trust accounts.

(d) *Non-LSC funds* means funds derived from a source other than the Corporation.

(e) *Private funds* means funds derived from an individual or entity other than a governmental source or LSC.

(f) *Public funds* means non-LSC funds derived from a Federal, State, or local government or instrumentality of a government. For purposes of this part, IOLTA funds shall be treated in the same manner as public funds.

(g) *Transfer* means a payment of LSC funds by a recipient to a person or entity for the purpose of conducting programmatic activities that are normally conducted by the recipient, such as the representation of eligible clients, or that provide direct support to the recipient's legal assistance activities. Transfer does not include any payment of LSC funds to vendors, accountants or other providers of goods and services made by the recipient in the normal course of business.

(h) *Tribal funds* means funds received from an Indian tribe or from a private nonprofit foundation or organization for the benefit of Indians or Indian tribes.

§ 1610.3 Prohibition.

A recipient may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with Section 504, unless such use is authorized by §§ 1610.4, 1610.6 or 1610.7 of this part.

§ 1610.4 Authorized use of non-LSC funds.

(a) A recipient may receive tribal funds and expend them in accordance with the specific purposes for which the tribal funds were provided.

(b) A recipient may receive public or IOLTA funds and use them in accordance with the specific purposes for which they were provided, if the funds' are not used for any activity prohibited by or inconsistent with Section 504.

(c) A recipient may receive private funds and use them in accordance with the purposes for which they were provided, provided that the funds are not used for any activity prohibited by the LSC Act or prohibited or inconsistent with Section 504.

(d) A recipient may use non-LSC funds to provide legal assistance to an individual who is not financially eligible for services under part 1611 of this chapter, provided that the funds are used for the specific purposes for which those funds were provided and are not used for any activity

prohibited by the LSC Act or prohibited by or inconsistent with Section 504.

§ 1610.5 Notification.

(a) Except as provided in paragraph (b) of this section, no recipient may accept funds from any source other than the Corporation, unless the recipient provides to the source of the funds written notification of the prohibitions and conditions which apply to the funds.

(b) A recipient is not required to provide such notification for receipt of contributions of less than $250.

§ 1610.6 Applicability.

Notwithstanding § 1610.7(a), the prohibitions referred to in §§ 1610.2(a)(4) (Criminal proceedings), (a)(5) (Actions challenging criminal convictions), (b)(7) (Aliens) or (b)(11) (Prisoner litigation) of this part will not apply to:

(a) A recipient's or subrecipient's separately funded public defender program or project; or

(b) Criminal or related cases accepted by a recipient or subrecipient pursuant to a court appointment.

§ 1610.7 Transfers of LSC funds.

(a) If a recipient transfers LSC funds to another person or entity, the prohibitions and requirements referred to in this part, except as modified by paragraphs (b) and (c) of this section, will apply both to the LSC funds transferred and to

the non-LSC funds of the person or entity to whom those funds are transferred.

(b) (1) In regard to the requirement in § 1610.2(b)(5) on priorities, persons or entities receiving a transfer of LSC funds shall either:

> (i) Use the funds transferred consistent with the recipient's priorities;
> or
> (ii) Establish their own priorities for the use of the funds transferred consistent with 45 CFR part 1620;

> (2) In regard to the requirement in § 1610.2(b)(6) on timekeeping, persons or entities receiving a transfer of LSC funds are required to maintain records of time spent on each case or matter undertaken with the funds transferred.

(c) For a transfer of LSC funds to bar associations, *pro bono* programs, private attorneys or law firms, or other entities for the sole purpose of funding private attorney involvement activities (PAI) pursuant to 45 CFR part 1614, the prohibitions or requirements of this part shall apply only to the funds transferred.

§ 1610.8 Program integrity of recipient.

(a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have

objective integrity and independence from such an organization if:

(1) The other organization is a legally separate entity;

(2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities; and

(3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:

(i) The existence of separate personnel;

(ii) The existence of separate accounting and timekeeping records;

(iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and

Appendix H

(iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.

(b) Each recipient's governing body must certify to the Corporation within 180 days of the effective date of this part that the recipient is in compliance with the requirements of this section. Thereafter, the recipient's governing body must certify such compliance to the Corporation on an annual basis.

§ 1610.9 Accounting.

Funds received by a recipient from a source other than the Corporation shall be accounted for as separate and distinct receipts and disbursements in a manner directed by the Corporation.

Dated: May 19, 1997.

Victor M. Fortuno,

General Counsel

Supreme Court, U.S.
FILED
OCT 19 1998
OFFICE OF THE CLERK

No. 98-296

In The

Supreme Court of the United States

OCTOBER TERM, 1998

LEGAL AID SOCIETY OF HAWAII, *et al.*,
Petitioners,

v.

LEGAL SERVICES CORPORATION and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF OF THE LEGAL SERVICES CORPORATION IN OPPOSITION

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OCTOBER 19, 1998

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QUESTION PRESENTED

Whether the court of appeals correctly found that the restrictions on the activities of Legal Services Corporation ("LSC") grantees contained in the 1996 and 1997 Omnibus Appropriations Acts, Pub. L. No. 104-134, 110 Stat. 1321, Pub. L. No. 104-128, 110 Stat. 3009 ("1996 and 1997 Acts"), and LSC's regulations implementing those restrictions, 45 C.F.R. Part 1610, do *not* impose an unconstitutional condition on Petitioners' exercise of First Amendment rights.

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STATEMENT OF THE CASE

I. ORIGINS AND PURPOSE OF THE LSC PROGRAM

The 1974 Legal Services Corporation Act ("1974 Act") established an independent, nonprofit corporation to provide funding for basic legal services to indigent persons. Pub. L. No. 93-355, 88 Stat. 378 (1974) (*codified as amended*, 42 U.S.C. §§ 2996 *et seq.* (1994)). The text and legislative history of the 1974 Act establish three basic principles relevant to this case: *first*, the Legal Services program is designed as a selective subsidy program that relies on both federal monies and funding from other sources; *second*, the mission of the program is to provide "bread and butter" services to meet the day-to-day legal needs of the poor; and *third*, Congress intended that the program remain strictly apolitical.

In establishing the Legal Services program, Congress created a grants-in-aid program in which the Legal Services Corporation ("LSC") distributes funds appropriated by Congress on a yearly basis to local grantee organizations which currently compete for funding by submitting detailed applications to LSC describing their proposed activities. *See* 42 U.S.C. §§ 2996b(a), 2996e(a); Supplemental Excerpts of Record ("S.E.R.") 56. Congress envisioned that grantees would generate additional (nonfederal) financial support for activities conducted under the program's auspices. *See, e.g.*, 42 U.S.C. §§ 2996e(a)(2), 2996i(c). Although no specific matching formula is required, applicants must describe a strategy for attracting non-LSC funds. As a practical matter, virtually all LSC grantee programs are funded with a combination of LSC and non-LSC funds from public and/or private sources. *Id.*; Pet. 106a.[1/]

[1/] For example, Petitioner Legal Aid Society of Hawaii ("LASH") generated 72% of its 1997 yearly budget from nonfederal sources; (continued...)

Congress has repeatedly emphasized that the LSC program exists primarily to provide *basic* legal services to the poor. As one Member stated at LSC's inception, grantee lawyers should be "preoccupied with day-to-day problems involving housing, domestic relations, consumer affairs, and employment" instead of "spending their time reforming laws they find discriminatory against the poor through class action and test-case litigation." 119 Cong. Rec. 20688 (1973) (Rep. Biester).[2/] Although the 1974 Act allowed some additional activities, the legislative history makes clear that Congress intended for the LSC program to emphasize individual cases in consumer and family law, housing, and the like.[3/] This focus on "bread and butter" services, 142 Cong. Rec. H8189 (July 23, 1996) (Rep. Torkildsen), defines the political consensus that has sustained LSC from 1974 to the present.

[1/](...continued)
Petitioner Alaska Legal Services Corporation ("ALSC") 59%; and Petitioner Legal Aid Society of Orange County ("LASOC") 21%. S.E.R. 2-3, 5-6. For FY 1996, Petitioners Legal Services of Northern California ("LSNC") and San Fernando Valley Neighborhood Legal Services ("SVNLS") generated 49% and 44% of their respective budgets from nonfederal sources. S.E.R. 3-4.

[2/] *Accord* H.R. Rep. No. 95-310, at 34 (1977) ("The purpose of this legislation should be to provide traditional legal representation for the poor.") (views of Rep. McClory); *see also* 142 Cong. Rec. H8178 (July 23, 1996) (describing "the purposes which we all endorsed, to meet the day-to-day legal problems of the poor") (Rep. Fox); *id.* at H8180 ("[T]hey are supposed to be doing ham and eggs work for poor people.") (Rep. Hunter).

[3/] The debates on the 1996 Act reflect a similar focus. *See, e.g.*, 141 Cong. Rec. S18160 (Dec. 7, 1995) (emphasizing "such routine legal matters as consumer problems, housing issues, domestic and family cases, and . . . public benefits") (Sen. Sarbanes).

Congress safeguarded this focus in the 1974 Act itself. Section 2996(5) stated that "[t]he legal services program must be kept free from the influence of or use by it of political pressures," and other provisions barred political activity by LSC or its grantees.[4/] These provisions were accompanied by specific limits on LSC activities to keep LSC clear of politically controversial areas. The 1974 Act prohibited litigation concerning school desegregation, abortion, and "draft-dodgers." 42 U.S.C. §§ 2996f(b)(8)-(10). The 1974 Act also limited criminal representation, class actions, and fee-generating cases. *Id.* §§ 2996e(d)(5), 2996f(b)(1)-(4). Most of these limitations applied even to activities funded entirely by private donors. *See id.* § 2996i(c) ("NonFederal funds [except public and tribal funds] received for the provision of legal assistance shall not be expended . . . for any purpose prohibited by this subchapter.").

Congress, moreover, has seen these substantive limitations as critical in realizing the 1974 Act's purpose of keeping LSC apolitical. As Representative Butler observed in 1977, "part of the reason for [LSC's] success in avoiding the 'political thicket' and controversy has been some of the restrictions we placed in the original act of 1974." H.R. Rep. No. 95-310, at 31 (1977) (supplemental views).

Accordingly, far from providing comprehensive legal services to the poor, the Legal Services program has always had a limited focus and has made grant awards contingent on the willingness of recipients to pursue the program's objectives.

[4/] *See* 42 U.S.C. § 2996e(d)(3) (barring campaign contributions by LSC or its grantees); *id.* § 2996e(d)(4) (barring all activities "advocating or opposing any ballot measures, initiatives, or referendums"); *id.* § 2996f(5) (restricting lobbying).

II. THE 1996 COMPROMISE

In 1995 and 1996, the LSC program came under new pressure due to budgetary constraints and a perception by some in Congress that LSC was unduly influenced by "liberal activists who favor a militant agenda." 141 Cong. Rec. S14592 (Sept. 29, 1995) (Sen. Gramm). Congress rejected efforts to kill the program altogether, in favor of a bipartisan proposal that reduced LSC's appropriation, added further subject-matter limitations, and extended those limits to cover *all* funds of LSC grantees. Congress emphasized that "[t]hese restrictions are to ensure that funding is used to provide the traditional legal services that are most needed by poor people." 141 Cong. Rec. S14605 (Sept. 29, 1995) (Sen. Stevens); *see also id.* at S14590 ("[T]hese restrictions provide the necessary guidance to take Legal Services back to its primary mission.") (Sen. Kassebaum).

The Congressional debates show that the limitations included in the 1996 and 1997 Acts were an effort to *save* LSC's basic mission through compromise, rather than a hostile attempt to eliminate the program.[5/] "While some may not like these restrictions," Senator Domenici explained, "they are necessary to . . . protect LSC from the negative perceptions of those who wish to see its termination." 142 Cong. Rec. S1963 (March 13, 1996). Critics of LSC remain vigilant, however, and strict adherence to the restrictions in the 1996 and 1997 Acts remains essential to prevent the legislative compromise from unraveling. S.E.R. 25-26, 87.

[5/] Reports of the 1996 and 1997 Acts do not discuss the purposes of the challenged restrictions in detail. The Senate's report on S.1221, a contemporaneous but unsuccessful effort to codify identical restrictions in the LSC Act itself, explained that such restrictions would "refocus LSC on its primary mission, which is to provide basic legal services to indigent American citizens." S. Rep. No. 104-392, at 2 (1996).

The limitations contained in the 1996 and 1997 Acts fall into four categories:[6/]

1. ***Lobbying Limitations***. A grantee attorney may not participate in legislative or administrative advocacy. *See* 45 C.F.R. Part 1612. The attorney may, however, use non-LSC funds to participate in public rulemaking of any sort (including reform of a welfare law), 45 C.F.R. § 1612.6(e); to respond to written requests for information from agencies or legislatures, *id.* § 1612.6(a); and to lobby for funding of the grantee organization. *Id.* § 1612.6(f); S.E.R. 48-49.

2. ***Subject Matter Limitations***. A grantee attorney may not participate in litigation, or initiate lobbying or rulemaking, that involves an effort to reform a Federal or State welfare system. *See* 1996 Act §§ 504(a)(2)-(6), (12), (16), 504(b), 504(d)(1), 504(e); 45 C.F.R. Parts 1612, 1639. (A grantee attorney may, however, litigate to enforce existing welfare law. 45 C.F.R. § 1612.5; S.E.R. 49-50.) Grantee attorneys may not provide legal assistance (other than services related to domestic violence) to ineligible aliens. *See* 1996 Act § 504(a)(11); 1997 Act § 502(a)(2)(C); 45 C.F.R. Part 1626; S.E.R. 50. Nor may grantee attorneys defend a person being evicted from public housing if that person is charged with a drug offense. *See* 1996 Act § 504(a)(17); 45 C.F.R. Part 1633; S.E.R. 52. The 1996 and 1997 Acts also retain and, in some cases, extend or add to pre-existing limitations on litigation involving prisoners, abortion, and redistricting. *See* 1996 Act §§ 504(a)(1), (14), (15); 45 C.F.R. Parts 1632, 1637; S.E.R. 50-52.

[6/] All of these rules are subject to the requirement that "[legal services] attorneys must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. § 2996(6); *see also id.* §§ 2996e(b)(3), 2996f(a)(1).

3. ***Litigation Rules.*** The 1996 and 1997 Acts bar grantees from initiating or participating in class actions, *see* 1996 Act § 504(a)(7); 45 C.F.R. Part 1617; however, grantees may handle the case for an individual client or refer prospective class action clients elsewhere. S.E.R. 48, 53. Grantee attorneys also may not claim, collect, or retain attorney's fees, *see* 1996 Act § 504(a)(13); 45 C.F.R. Part 1642,[7/] except where court appointments or court-imposed sanctions are involved. *Id.*; S.E.R. 53.

If a grantee attorney feels that prohibited advocacy is in a client's best interests, he may refer the client to an organization not subject to the limitations. Furthermore, full-time employees may engage in prohibited activities such as administrative and legislative advocacy in their individual capacity on their own time (*e.g.*, on leave or outside of business hours). S.E.R. 34. The regulations also permit part-time employees — including lawyers — to engage in prohibited activities as employees of non-LSC organizations that are financially and physically separate from the LSC grantee. S.E.R. 34-35, 87-88.

4. ***Funding Rules.*** The most significant change in the 1996 and 1997 Acts is the application of the restrictions to *all* of a grantee's funds, and to any entity receiving a transfer of LSC funds. *See* 1996 Act § 504(d); 45 C.F.R. Part 1610. Under prior law, all restrictions applied to a recipient's LSC funds and most — including restrictions on politically controversial subject areas, *see* 45 C.F.R. Part 1610 (1976) — also applied to a recipient's private funds; no limitations applied to a recipient's tribal or nonfederal public funds.

[7/] The rule covers private attorneys *paid* by grantees to handle cases, but does *not* apply to outside attorneys working *pro bono*. 45 C.F.R. § 1642.4.

III. LSC'S IMPLEMENTING REGULATIONS AND THE CURRENT LITIGATION

Almost immediately after the passage of the 1996 Act, LSC began drafting implementing rules to ensure that grantees did not engage in prohibited activities. *See* S.E.R. 47. The initial regulations permitted organizations affiliated with grantees to engage in prohibited activities so long as those organizations were not effectively controlled by the LSC grantee. *See* S.E.R. 69-72. Effective control was determined through an "interrelated organizations" test that involved consideration of factors such as overlapping directors and shared funding. S.E.R. 66.

Pursuant to the new statutory restrictions, LSC managed the withdrawal of grantee organizations from 630 class actions, 2991 cases for ineligible aliens, and 428 prisoner cases nationwide. S.E.R. 65. These withdrawals usually involved settlement of litigation, securing replacement counsel, or shifting full responsibility to existing co-counsel. S.E.R. 64-66. Successor counsel or co-counsel were chosen because they were willing and competent to represent LSC's indigent clients. S.E.R. 22.

Although they raised no constitutional objections in the rulemaking proceeding, *see* S.E.R. 37-44, 47-48, Petitioners filed this lawsuit on January 9, 1997, challenging the facial constitutionality of the restrictions and implementing regulations, and seeking a preliminary injunction. The district court evaluated Petitioners' likelihood of success on the merits in terms of "whether adequate, alternative channels exist for the organizations to voice their un-subsidized opinion." Pet. 91a. Because LSC's "interrelated organizations" policy precluded the establishment of non-restricted affiliates controlled by an LSC grantee and funded solely with non-LSC monies, the district court found that LSC had failed to allow for adequate alternative channels under *Rust v. Sullivan*, 500

U.S. 173 (1991), *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), and *FCC v. League of Women Voters*, 468 U.S. 364 (1984). Pet. 90a-97a. The court rejected Petitioners' arguments that restrictions on class actions, claims for attorney's fees, and representation of ineligible aliens implicated any constitutional rights. Pet. 79a-83a. Those restrictions were therefore excluded from the preliminary injunction granted on February 14, 1997. Pet. 103a-104a.

LSC undertook a careful review of its implementing rules in response to the district court's constitutional concerns. New interim rules deleted restrictions on transfers of non-LSC funds and created an avenue for expression through "interrelated organizations" that were "physically and financially separate" from LSC grantees. 62 Fed. Reg. 12101, 12104 (March 14, 1997). Commentary to those rules explained that the physical and financial separation requirement was modelled directly on the Title X regime upheld in *Rust*. After receiving comments from Petitioners and others, LSC promulgated a Final Rule on May 21, 1997. That rule deleted all reference to the prior "interrelated organizations" test — which Petitioners and others had found confusing — and removed minor variations in phrasing between LSC's program integrity requirements and those sustained in *Rust*. 62 Fed. Reg. 27697-98.

On cross-motions for summary judgment, the district court upheld in their entirety the 1996 and 1997 Acts and LSC's revised implementing regulations. Reading the revised regulations "as allowing a LSC funded organization to control another organization that engages in restricted activities so long as all the insularity and separate incorporation requirements of the regulations are satisfied," the district court found that "alternative channels exist for LSC-funded organizations to exercise their constitutionally protected rights such as lobbying the legislature." Pet. 38a. The court noted that "[t]he insularity requirements have already been upheld

in *Rust* and the Court finds Plaintiffs' many efforts to distinguish the case unpersuasive." *Id.* Although it recognized that "[u]nlike *Rust* . . . the regulations here also require that an affiliate be separately incorporated," the court "[did] not find that the separate incorporation requirement limits the availability of alternate channels any more than the insularity requirement alone did in *Rust*." Pet. 38a-39a. Finally, the court found that the regulations "do not violate Plaintiffs' Due Process or Equal Protection rights." Pet. 39a.

On May 18, 1998, the Ninth Circuit Court of Appeals affirmed the district court. In an opinion authored by Justice Byron White (sitting by designation), the court of appeals found the new LSC rules "nearly identical to [those] upheld in *Rust*" and concluded that there is "no basis for distinguishing this case from *Rust*." Pet. 18a. Justice White rejected as "misplaced" Petitioners' argument that the LSC program integrity rules differ from those in *Rust* simply because they "apply to 'recipients,' and not 'projects.'" Pet. 22a. The court held that, under *Rust*, *TWR*, and *League of Women Voters*, the constitutional inquiry turns not on terminology but on whether the regulations "prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program." Pet. 22a.

The court of appeals, moreover, held that Petitioners' laundry list of "hardships" are of no constitutional moment because they are (a) unsupported by any "substantial evidence . . . concerning how the LSC regulations will be . . . applied" *and* (b) inconsistent with the "text of the regulations" which calls for a case-by-case approach. Pet. 25a. Given the facial nature of Petitioners' challenge, the court refused to invalidate LSC's program integrity rules based on "hypothetical application[s]." Pet. 25a. In any event, the court observed, compliance burdens are of no constitutional significance if the requirements of *Rust* are fulfilled. Pet. 26a. Nor were Petitioners' efforts to "re-read"

Rust in light of *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), successful. The court of appeals held that, unlike the Student Activities Fund in *Rosenberger*, the LSC program involves the government appropriating public funds "to promote a particular policy of its own," Pet. 27a, *not* to encourage a diversity of views from private speakers.

Finally, the court rejected Petitioners' contention that strict scrutiny applies in this case. The court explained that nothing in *Rust* requires the government to establish a compelling interest before imposing restrictions to ensure that its funds are used for non-prohibited purposes. Pet. 27a-28a.[8/]

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any court of appeals. Indeed, the Court just this last term in *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998), clarified the meaning and scope of the unconstitutional conditions doctrine in a manner that is consistent with the decision below. Nonetheless, Petitioners try to make this case appear more complicated and unique than it is. They argue that the court of appeals "misapplied" *Rust* by ignoring critical distinctions between that case and this one, and that the Supreme Court's "trilogy" of subsidy cases requires the application of some sort of "compelling interest" test (which Petitioners now recast as a "no more restrictive than necessary" test). In fact, the alleged distinctions between *Rust* and the present case are either immaterial or irrelevant to the

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[8/] The Ninth Circuit also vacated the district court's judgment that the LSC restrictions do not violate the Due Process and Equal Protection rights of legal services clients, ruling that the Petitioners have no standing to raise these issues. Petitioners do not seek review of this ruling.

constitutionality of the LSC scheme. The Court's subsidy cases, moreover, do not require a compelling interest test, as last term's *Finley* decision reaffirmed. In short, there is no reason for this Court to grant the petition.

I. THIS CASE DOES NOT MEET THE COURT'S STANDARDS FOR GRANTING *CERTIORARI*.

Nothing in the petition indicates that this case warrants discretionary review by this Court under Supreme Court Rule 10.1. Petitioners identify no conflict among the circuits on any issue relating to the 1996 and 1997 Acts and implementing regulations involved in this case. Every federal court to address the issue — the district court and the Ninth Circuit in this case, and the district court for the Eastern District of New York in *Velazquez v. LSC*, 985 F. Supp. 323 (E.D.N.Y. 1997) — has held that the challenged restrictions are constitutional.[2/]

Nor is there any warrant for taking this case in order to "consider the relationship between the unconstitutional conditions doctrine and the authority of Congress to determine the conditions for use of its own funds." Pet. 16. As demonstrated below, the Ninth Circuit's decision involved nothing more than the application of well-settled law articulated in this Court's conditional spending cases — *Rust*, *TWR*, and *League of Women Voters*. To the extent that the outer limits of the unconstitutional conditions doctrine remain somewhat unclear, this case offers little opportunity to clarify them; the challenged restrictions, after all, conform as strictly as possible to the standards upheld in *Rust*.

In any event, this Court undertook to clarify the government's authority to impose restrictions on grants for

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[2/] The *Velazquez* case is currently pending in the Second Circuit (No. 98-6006).

expressive activity last term in *Finley*. Petitioners have not argued that the decision below conflicts with *Finley* in any significant way.[10/] The appropriate course is to allow the lower courts an opportunity to interpret and apply *Finley* before taking another case on the issue. Only then will this Court know what issues — if any — remain for clarification.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE LSC RESTRICTIONS DO NOT IMPOSE AN UNCONSTITUTIONAL CONDITION ON PETITIONERS' EXERCISE OF FIRST AMENDMENT RIGHTS.

A. The Court of Appeals Correctly Applied This Court's Unconstitutional Conditions Decisions.

This Court's trilogy of cases concerning the government's ability to place limits on subsidy programs involving expression establish three basic principles: (1) the government may place limitations on programs it funds in order to avoid

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[10/] Petitioners mention *Finley* only twice, each time in a footnote. While they suggest that *Finley* supports a claim that Congress sought to restrict the speech of LSC grantees based on the viewpoints they espoused, Pet. 23 n.21, the district court correctly noted that Petitioners had waived any viewpoint claim. *See* Pet. 66a n.20. Petitioners' second reference to *Finley*, *see* Pet. 29-30 n.31, is an attempt to distinguish *Finley*'s rejection of a facial challenge. As demonstrated *infra*, at Section II.B.3., the effort fails. Moreover, while Petitioners have at times argued that this case is not covered by the facial challenge doctrine simply because it involves a free speech claim, the court of appeals resolved that question against them, Pet. 16a, and they have not included it within the "question presented" in their petition. Petitioners suggest that "the instant case also fits comfortably within the standard First Amendment paradigm in which facial challenges are entertained for overbreadth and vagueness," Pet. 30 n.31, but the district court correctly noted that they "have not alleged that the restrictions are vague or overbroad." Pet. 49a. In any event, this Court applied the facial challenge doctrine to a nearly identical First Amendment claim in *Rust* itself. *See* 500 U.S. at 183.

subsidizing activity it does not wish to support, *TWR*, 461 U.S. at 546; (2) when it does so, the government must leave open adequate alternative channels outside the scope of the government's program for those accepting government funding to exercise their constitutional rights using nonfederal funds, *League of Women Voters*, 468 U.S at 400; and (3) the government may require that any alternative channels for expression conducted with nonfederal funds be physically and financially separate from the subsidized activity, *Rust*, 500 U.S. at 190-91. LSC's program integrity rules are plainly constitutional under this jurisprudence.

1. LSC's Program Integrity Rules Are Constitutional Under *Rust*.

That LSC modelled its revised regulations on the Title X regime upheld in *Rust* is undisputed. *See* Pet. 19a-21a. This choice reflects several relevant similarities between the legal services and family planning contexts. Both involve confidential professional counseling that covers a wide range of topics; both sets of professionals have significant ethical duties to their clients (although the LSC regime provides specific statutory protection for activity required by a lawyer's ethical duties that was absent in *Rust*, *see* 42 U.S.C. § 2996(b)[11]); and while both medical and legal services can be allocated between government-funded and non-funded activities through mere bookkeeping arrangements, in both cases the provision of subsidized and non-subsidized activities by the same staff, under the same roof, raises significant potential for indirect subsidies and for public misperception about the scope of the government's support.

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[11] *See supra*, note 6. In other words, if there is a conflict between the LSC program restrictions and the ethical rules governing the attorney in question, it is the program restrictions that must yield.

Petitioners forcefully urged the district court to focus on *Rust* at the preliminary injunction phase, Pet. 47a-48a, and LSC rewrote its rules in response to the district court's constitutional concerns. LSC's program integrity rules permit a grantee to create an affiliate free from the challenged restrictions, so long as the affiliate is "physically and financially separate" from the LSC grantee, and the entities have "objective integrity and independence from [one another]." 45 C.F.R. § 1610.8(a). This physical and financial separation requirement was borrowed directly from the program integrity requirements upheld in *Rust*. *See* 42 C.F.R. § 59.9 (1990) ("A Title X project must be organized so that it is *physically and financially separate*" from prohibited abortion activities, and must have "an *objective integrity and independence* from prohibited activities.") (emphasis added). As the court of appeals explained, LSC's rules determine physical and financial separation based on factors virtually identical to those approved in *Rust*. Pet. 19a-21a. Moreover, like the Title X program, program integrity under LSC's rules is determined "on a case-by-case basis . . . based on the totality of the facts." 45 C.F.R. § 1610.8(a)(3). So long as the affiliate is separately incorporated and receives no LSC funds, "[t]he presence or absence of any one or more [other] factors will not be determinative." *Id.*

In one important way, the LSC rules are *more* flexible and permissive, for purposes of the First Amendment, than the program integrity rules in *Rust*. Unlike Title X, which totally banned discussions of, and referrals to, abortion service providers, LSC's rules impose no "gag rule" forbidding grantees to mention prohibited litigation options to clients, or to refer clients directly to the grantee's affiliate or another independent entity that engages in restricted activities.

Notwithstanding their reliance on *Rust* at the preliminary injunction stage, once LSC revised its regulations to conform

to *Rust*, Petitioners abruptly distanced themselves from the case.[12/] Their efforts to distinguish *Rust*, however, are wholly without merit.

2. Nothing Turns on a Distinction Between "Projects" and "Recipients."

Petitioners place great weight on the fact that the Title X regulations restricted "*projects*" while the LSC regulations restrict "*grantees*." Pet. 19. But as the court of appeals correctly recognized, the proper constitutional test is not whether 45 C.F.R. uses the same terminology as 42 C.F.R., but whether LSC's regulations prevent grantees from engaging in constitutionally protected activity outside the scope of the federally funded program. Pet. 22a; *Rust*, 500 U.S. at 197. The LSC regulations satisfy this test.

Rust involved a structure where abortion and family-planning services had to be conducted by physically and financially separate "projects," but those programs could be operated under the auspices of one single incorporated "recipient." LSC's rules permit the "recipient" grantee and unrestricted affiliate to be under common control, but require the entities to be separately incorporated as well as physically and financially separate. The *only* difference between the two structures is that, in *Rust*, a single corporate entity was permitted to engage in both subsidized and restricted activities, while here those activities must be carried out through separately incorporated affiliates. As the Court noted in *TWR*, the requirement of separate incorporation presents no constitutional difficulty. 461 U.S. at 544 n.6.

[12/] *See* Pet. 47a-48a ("Plaintiffs argued rather vehemently in the motion for a preliminary injunction that *Rust* applied to this case . . . . Now that the LSC has attempted to comply with the dictates in *Rust*, however, the Plaintiffs argue that *Rust* does not apply.").

3. The LSC Program Does Not Fit Within a "Traditional Sphere of Expression" Exception.

Petitioners contend that the LSC program falls within a "traditional sphere of expression" exception to the government's broad authority to limit the programs it funds. Petitioners seek refuge in a passage in *Rust* which explains that the existence of a government subsidy "does not justify the restriction of speech in areas that have been 'traditionally open to the public for expressive activity,'" or in areas "'expressly dedicated to speech activity.'" *Rust*, 500 U.S. at 199-200, *citing United States v. Kokinda*, 497 U.S. 720 (1990); *Hague v. CIO*, 307 U.S. 496 (1939); *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S 37 (1983). Pet. 17.

Petitioners' argument is nothing more than a belated and misplaced attempt to shoehorn the LSC program into this Court's public forum cases. Petitioners, however, have never alleged, much less proven, that the LSC program is a public forum. Indeed, contrary to their contention that the LSC program is intended to provide "comprehensive" legal services to the poor, Pet. 21, LSC's organic statute limits the extent of the program in many significant ways.[13/]

These restrictions — which existed long before the restrictions challenged in this case — belie any attempt by Congress to provide "general access" to the Legal Services program, *see Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1642 (1998), or to "encourage a diversity of views from private speakers," *Rosenberger*, 515 U.S. at 834.

[13/] As explained *supra* at pp. 1-4, LSC's organic statute sets forth detailed qualifications for participation in the program, sharply limits the subject matter of included advocacy, and defines LSC's purpose as meeting the basic legal needs of poor people rather than facilitation of open-ended expression of any kind.

Indeed, as in *Forbes*, LSC funding is made available to grantees only after "individual, non-ministerial judgments as to which of the eligible [applicants] would participate." 118 S. Ct. at 1642. The LSC program should therefore be evaluated as a nonpublic forum, and any "reasonable" regulation of access that does not discriminate on the basis of viewpoint must be upheld. *Id.* at 1643.[14/]

To be sure, *Rust* acknowledged that "[i]t could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government." 500 U.S. at 200. However, if the lawyer-client relationship were a "'traditional sphere' of First Amendment activity," Pet. 21, it would be a highly regulated one. It is hard to imagine, for example, a more content-based restriction on speech than Fed. R. Civ. P. 11. Subjecting such regulations to strict scrutiny under the First Amendment would radically reshape the regulation of lawyers in this country. Moreover, any reasonable exception for professional relationships would be coextensive with the ethical duties implicit in those relationships. Here, the statute explicitly exempts activity *required* by an attorney's ethical obligations from the restrictions in the challenged regulations. *See supra*, notes 6 and 11. Plaintiffs thus fit *within* the rule of *Rust* — not the exception.

[14/] *See also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 805 (1985) (finding that the Combined Federal Campaign was a nonpublic forum based on "selective access, unsupported by evidence of a purposeful designation for public use").

4. *Rust* Cannot Be Distinguished on the Ground That It Involved a Government Message.

Petitioners place great weight on this Court's characterization of *Rust* as a case in which the government "used private speakers to transmit specific information pertaining to its own program." *Rosenberger*, 515 U.S. at 833. Based on this characterization, Petitioners would hold *Rust* inapplicable to any case lacking a specific, articulable government message. Even if the *Rosenberger* gloss on *Rust* could somehow supplant the *Rust* opinion, Petitioners would nonetheless be mistaken.

As Justice White recognized below, the critical distinction in *Rosenberger* was between cases where the government has "expend[ed] funds to encourage a diversity of views from private speakers," Pet. 27a (*quoting Rosenberger*, 515 U.S. at 834), and cases where "the government [has] appropriate[d] public funds to promote a particular policy of its own." Pet. 27a (*quoting Rosenberger*, 515 U.S. at 833). Justice White properly placed this case in the latter category, finding that "[l]ike the Title X program in Rust, the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas." Pet. 27a.

This Court's decision last term in *Finley* confirmed Justice White's interpretation of *Rosenberger*. In *Finley*, the Court expressly declined to apply *Rosenberger*'s rule of strict scrutiny, because "[i]n the context of arts funding . . . the Government does not indiscriminately 'encourage a diversity of views from private speakers.'" 118 S. Ct. at 2178 (*quoting Rosenberger*, 515 U.S. at 834). *Finley* thus makes clear that it is the government's intent to "encourage a diversity of views from private speakers," rather than the absence of an articulable government "message," that triggers *Rosenberger*'s more demanding standard.

Where the government pursues some specific policy objective of its own — such as subsidizing the provision of family planning or legal services in certain limited situations — *Rust*'s analysis retains its full force. Indeed, Justice O'Connor's opinion in *Finley* reiterated that "as we held in *Rust*, Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.'" 118 S. Ct. at 2179 (*quoting Rust*, 500 U.S. at 193). The policy objectives in this case are much more apparent than in *Finley*, where the only limitation on the government's broad policy to promote diverse views was the requirement of "artistic excellence."[13/]

In any event, this case would pass muster even under a government "message" standard. As this Court made clear last term in *Forbes*, decisions concerning the "selection" or "compilation of the speech of third parties" constitute "communicative acts." *Forbes*, 118 S. Ct. at 1639 (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 570 (1995)).[14/] This is true, moreover, even when the entity doing the selection is a state actor. *Id.* Congress's expression of a policy to use third-party grantees to promote legal services in some areas — such as landlord-tenant or consumer law cases — but not in others

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[13/] As in *Finley*, LSC awards grants on a competitive basis according to the degree to which an applicant is likely to further the government's policy objectives. *See* 118 S. Ct. at 2179 (noting that "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake").

[14/] *Forbes* further confirms that the government may and does create limited public fora for speech challenging current government policy.

thus amounts to a "message" within the broad meaning of that term recognized in this Court's precedents.

B. LSC's Program Integrity Rules Are Not Unconstitutionally Burdensome.

Petitioners argue that reliance on *Rust* in this case is too "mechanistic," Pet. 18, because it ignores the unique burdens imposed on grantees by the LSC program integrity rules. As the court of appeals correctly recognized, this argument is erroneous for several reasons.

1. The Potential Burden of Compliance With LSC's Eligibility Requirements Does Not Raise Constitutional Questions.

Although it may well be more difficult to run "physically and financially separate" operations than commingled ones, the government's right to require objective separation between activities it wishes to fund and activities it does not wish to fund is not limited by the cost of compliance. The *Rust* plaintiffs, like Petitioners here, argued that program integrity rules requiring separate facilities and personnel impose unconstitutional burdens upon a federal grantee's operations.[15/] This Court has thus seen Petitioners' burden argument before — and has rejected it. *See Rust*, 500 U.S. at 191 (holding that the program integrity requirements "do not raise . . . 'grave and doubtful constitutional questions.'"). As the court of appeals correctly understood, *see* Pet. 26a,

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[15/] *Compare, e.g.*, Petitioners Brief in *Rust* at 27 ("[S]ection 59.9 [program integrity] severely impairs and may render physically impossible the effort of Title X grantees to engage in protected speech by consolidating programs supported with financially segregated funds.") (S.E.R. 100) *with* Pet. 28 ("LSC grantees are constrained by . . . restrictions which require them to operate under a system of mandated inefficiency (at the very least) or outright disability (frequently).").

nothing in *Rust* suggests that the constitutionality of the Title X regulations turned on a "balance of hardships," or that the burdens associated with program integrity compliance were even *relevant* to an unconstitutional conditions claim, as long as the recipient is not barred from pursuing prohibited activities outside of the federally funded program.

Rust's holding regarding the economic burdens of program integrity compliance is consistent with this Court's other unconstitutional conditions cases, in which the economic feasibility of exercising a right does *not* dictate whether the government must subsidize that right.[16/] As *Rust* makes clear, the government may impose significant obligations as a condition of financial aid. This Court should not revisit this well-established principle.

2. Compliance Burdens Here Do Not Materially Differ From Those In *Rust*.

The record is clear and undisputed that, in this case, the burdens imposed by the separate facilities and personnel requirements do not exceed those in *Rust*. The plaintiffs in *Rust* asserted that the burdens there were substantial, S.E.R. 101, and Petitioners have not demonstrated that the burdens involved in the legal services context are materially different in kind or degree. *See* Pet. 24a-27a. While the LSC

16/ *See, e.g., TWR*, 461 U.S. at 550 ("Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'") (*quoting Harris v. McRae*, 448 U.S. 297, 318 (1980)); *Maher v. Roe*, 432 U.S. 464, 474, 480 (1977) (holding that the economic impossibility of obtaining an abortion does not obligate government to fund the right or forego imposing threshold medical requirements to ensure that funds are spent for approved purposes).

regulations, unlike those in Rust, also require a grantee and its affiliate to be separately incorporated, Petitioners cannot show that the paperwork involved in filing incorporation papers amounts to the "straw that breaks the camel's back." This Court, after all, unanimously held in *TWR* that separate incorporation is *not* unduly burdensome. *See TWR*, 461 U.S. at 546; *id.* at 552-53 (Blackmun, J., concurring). In any event, as the district court noted and the court of appeals affirmed, Petitioners have proffered no facts showing that the separate incorporation requirement imposes any significant burden. Pet. 26a-27a; Pet. 56a. Indeed, ***all*** of the hardships which Petitioners claim they will suffer under LSC's new rules stem from the program integrity requirements, *not* from separate incorporation.[17/]

Moreover, Petitioners' description of their needs (and thus the extent of the burden) is unrealistic. They claim, for instance, that they cannot separately staff both a grantee and an affiliate at every remote location they serve, Pet. 13 n.11, but they have not explained why such staffing would be necessary. Most of the restrictions involve activities which are likely to be comparatively rare (*e.g.*, class actions) or which serve concentrated populations (*e.g.*, prisoners). Similarly, Petitioners have not offered any reason why they cannot carry out their primary lobbying activities from one or a few centralized locations. The district court found that Petitioners are capable of minimizing the burden of program

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[17/] *See* E.R. 171 (requirement that affiliate "remain sufficiently separate as to not share common offices or staff" is unduly burdensome); E.R. 185 ("compliance with the separate facilities and separate personnel requirements . . . would be all but unworkable"); *see also* Pet. 52a-53a.

integrity, and the court of appeals did not disturb this finding.[18/]

At bottom, Petitioners argue that they are constitutionally entitled to maintain their present levels of activity on all fronts in all existing locations, without having to undertake any restructuring as a result of the 1996 and 1997 Acts. *See, e.g.*, Pet. 27 n.26 (advocating mere bookkeeping separation). But that, as the court of appeals held, is not the law. *See* Pet. 26a-30a; *see also Rust*, 500 U.S. at 198 (upholding program integrity requirements that impose significant restructuring obligations as a condition for receiving Title X funding).

3. Mere Speculation About the Burden of Compliance Is No Basis For Facial Invalidation of the LSC Rules.

Petitioners' argument that the rules *might have* an unconstitutional application in some instances cannot justify reversal of the decision below. As this Court reiterated in *Finley*, legislation will not be invalidated on its face "'on the basis of its hypothetical application to situations not before the Court.'" *Finley*, 118 S. Ct. at 2177 (*quoting FCC v. Pacifica Foundation*, 438 U.S. 726, 743 (1978)).[19/] The argument that LSC's program integrity rules might impose an unconstitutional burden in some circumstances must be made

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[18/] For example, because LSC's rules do not bar referrals or other discussion of restricted advocacy, centralized intake procedures and "hot lines" are permissible under Part 1610. Petitioners inexplicably and inaccurately persist in arguing that such efficiencies are prohibited, Pet. 13 n.12, despite LSC's statements to the contrary. *See, e.g.*, LSC's Ninth Circuit Brief at 31.

[19/] Although *Finley* recognized that the First Amendment overbreadth doctrine sometimes warrants an exception to this rule, Petitioners have made no overbreadth argument in this case.

in the context of an as-applied challenge raising specific facts.[20/]

In any event, Petitioners have presented no evidence supporting their assertion that LSC will interpret and apply its regulations so as to suppress speech, and the text of the regulations does not support the argument. As the court of appeals emphasized, the LSC program integrity rules do ***not*** state (as Petitioners contend) that unrestricted affiliates are limited to overlapping boards of directors and that complete separation of facilities and personnel is required. Pet. 20 n.18. The regulations make clear that a number of factors will be considered, no one factor is dispositive, and program integrity determinations will be made on a case-by-case basis.[21/] In fact, in the instances where LSC has applied its rules so far, it has considered the totality of circumstances and

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[20/] Because these rules have never been applied to Petitioners, the record is too abstract to permit an "undue burden" analysis. *See Younger v. Harris*, 401 U.S. 37, 52-53 (1971); *Texas Rural Legal Aid v. Legal Services Corp.*, 783 F. Supp. 1426, 1429 (D.D.C. 1992) (rejecting facial challenge to LSC's redistricting restriction, and holding that "[a]ny such challenge must await a concrete instance of excessive application of the rule's strictures in a given situation"). The "burden" argument advanced by Petitioners is unripe for judicial review. *See Diamond Shamrock v. Costle*, 580 F.2d 670, 674 (D.C. Cir. 1978).

[21/] Petitioners' distinction between the "hortatory" nature of the *Finley* restrictions, *see* 118 S. Ct. at 2175, and those at issue here is specious. Pet. 29 n.31. As *Rust* made clear, a case-by-case approach to program integrity is constitutional. *See Rust*, 500 U.S. at 180. The point in *Finley* was ***not*** that eligibility requirements for admission into a subsidy program ***must*** be "advisory only"; it was that the hortatory nature of such requirements indicates their viewpoint neutrality.

allowed overlapping staff as needed.[22] Indeed, the court of appeals noted *twice*, Pet. 26a, 30a, that the record contradicts Petitioners' assertions about the restriction on sharing of personnel. The Court should not grant *certiorari* in this case simply because Petitioners believe that what LSC says in its rules is not what it means, or because Petitioners "'envision the most extreme applications conceivable.'" *Finley*, 118 S. Ct. at 2179 (*quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969)).

Further, Petitioners have produced no conclusive evidence demonstrating that they will *not* be able to comply with LSC's program integrity requirements. Despite Petitioners' protests that "many programs [for the poor] will be foregone entirely, while others will be rendered far less effective" due to the rules, Pet. 22, Petitioners' affidavits show just the opposite.[23] All five grantees are funded at levels varying from $2.3 million to $4 million and receive anywhere from $637,000 to $2 million in non-LSC funding. S.E.R. 105-08. Representatives of each grantee, moreover, have affirmed

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[22] *See* LSC Motion to Enlarge Record (March 2, 1998) Exhs. 1-4. Of the four requests for affiliated status received by LSC to date, two were granted, one became moot because the application was withdrawn, and one was denied because the only separation proposed was mere bookkeeping separation. Petitioners' suggestion that LSC will tolerate only a 10% overlap of staff is false. Pet. 20 n.17. This figure is meant to serve only "as a guide" for larger grantees. Memorandum from John A. Tull, Director, LSC Office of Program Operations, to all LSC Program Directors & Board Chairs re: Certification of Program Integrity (October 30, 1997), Addendum to Petitioners' Ninth Circuit Reply Brief at 6; *see also id.* at 9 (emphasizing that "guidance on particular factors should not be considered as providing a bright-line response that would be true in all circumstances").

[23] Petitioners claim that their factual allegations of burdensomeness have gone unrebutted, Pet. 13, but their *own* facts disprove their burden argument.

these entities' ability to undertake restricted activities with non-LSC funds. S.E.R. 105-09.

If LSC's restrictions are nonetheless burdensome, it must be because a certain amount of total funding — for both restricted and non-restricted activities — is necessary to produce the "critical mass" of personnel and facilities that makes a legal services organization viable. But the government has no constitutional obligation to subsidize LSC grantees by facilitating economies of scale. After all, the *Rust* plaintiffs pressed an "economies of scale" claim before the Court, arguing that "[t]he inability of grantees to consolidate programs supported by financially segregated funds in order to facilitate the provision of health services and information to low-income women 'dilutes' effective expression . . . and violates the First Amendment." S.E.R. 101. But that argument was rejected. As *Rust* shows, if Congress wishes to avoid facilitating economies of scale, it is entitled to do so.[24/] Moreover, Petitioners' own affidavits show that the non-LSC component of each grantee's budget is sizable enough to sustain an independent organization.[25/]

[24/] Courts in other contexts have recognized that two entities are not functionally independent where they share economies of scale. *See, e.g.*, *Campbell* v. *Merit Systems Protection Bd.*, 27 F.3d 1560 (Fed. Cir. 1994); *Saudi Iron and Steel Co.* v. *United States*, 686 F. Supp. 914 (Ct. Int'l Trade 1988).

[25/] The $2 million that LASH receives from non-LSC sources, for example, is comparable to the $2.3 million *total* budget of ALSC — which no one claims is not a fully viable separate entity. Indeed, of the 274 programs nationwide in which complete 1996 data is available, 129 grantees had total operating budgets of approximately $1 million or less. S.E.R. 86-87. And even the approximately $637,000 non-LSC contribution received by LASOC — the lowest such contribution among the Petitioners — exceeds the total operating budget of 66 LSC grantees operating elsewhere in the country. S.E.R. 87.

C. Because LSC's Rules Provide An Adequate Alternative Avenue For Protected Advocacy, They Do Not Restrict First Amendment Rights And Are Not Subject To Strict Scrutiny.

Petitioners urge this Court to grant their petition because of a purported need "to clarify the legal standard for determining when a restriction on the use of federal funds represents an unconstitutional condition." Pet. 22. However, this Court has already articulated a clear standard for gauging the constitutionality of government restrictions on subsidy programs. The "adequate alternative channels" test articulated and applied in *TWR*, *League of Women Voters*, and *Rust* is the threshold inquiry that differentiates between limitations on the scope of government subsidy programs and limitations that restrict constitutional rights. Only the latter are subject to strict scrutiny.

TWR states the general rule: "Congressional selection of particular entities or persons for entitlement to [Government] largesse 'is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find.'" 461 U.S. at 549. The "circumstances" to which the Court referred are those in which the funding restrictions imposed by the Government fail to provide adequate alternative channels for protected activities based on non-government funds. Because such channels existed in *TWR*, the Court found that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying." *Id.* at 546. As Justice Blackmun explained, "[a] § 501(c)(3) organization's right to speak is not infringed, because it is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities." *Id.* at 553 (Blackmun, J., concurring).

Petitioners are essentially asking the Court to abandon this standard and replace it with a "strict scrutiny" or "compelling interest" standard. Given the clarity with which *TWR* and *Rust* speak to the issue,[26] it is no wonder that Petitioners have distanced themselves from the term "strict scrutiny,"[27] and have transparently reformulated their argument into a "no more restrictive than necessary test" or an ambiguous "stringent level of scrutiny" test. Pet. 24, 29.

A "less restrictive alternative" test is completely unsupported by this Court's unconstitutional conditions jurisprudence. There is no discussion in *TWR* or *Rust* of "less restrictive alternatives" or alternatives precisely geared to the specificity of the government's message.[28] The Court did

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[26] Indeed, the Court in *TWR* explicitly rejected strict scrutiny. 461 U.S. at 549.

[27] Petitioners' contention that the court below *mischaracterized* their argument as a strict scrutiny test, Pet. 24, is patently false. Petitioners explicitly requested the court to apply strict scrutiny, and it appropriately refused to do so. *See* Appellants' Opening Brief at 25 (the unconstitutional conditions doctrine requires that government restrictions on subsidy programs be "subject to strict scrutiny and . . . be no broader than necessary to protect a compelling governmental interest"); *id.* at 31 n.21 ("the logic of [*TWR*, *League of Women Voters*, and *Rust*] is . . . consistent with strict scrutiny").

[28] In *League of Women Voters*, the Court simply required some alternative less restrictive than a total ban on speech. Indeed, the Court suggested that the statute at issue there would have been constitutional if noncommercial stations had the option of setting up an affiliate to editorialize. As a practical matter, the court invalidated the FCC subsidy because of a clear distinction in the facts as compared to *Rust* and *TWR*. In *League of Women Voters*, the restricted entity — the noncommercial television station or radio station — was also the *exclusive* possessor of the essential facility that made communication possible: a broadcast license.

(continued...)

recognize that the government's interest in each case — avoiding subsidization or the appearance of endorsement of lobbying and abortion, respectively — was legitimate, *see* 461 U.S. at 546; 500 U.S. at 193, but nowhere did the Court find it necessary to determine whether those interests would have been sufficient under strict scrutiny. Nor did the Court ask whether the government's interests could have been satisfied through less restrictive means.

In fact, in both *TWR* and *Rust,* less restrictive alternatives were clearly available. Petitioners claim that in *TWR* it was "*necessary* to require charitable groups to establish two legally distinct organizations." Pet. 25. However, Congress could have simply required that § 501(c)(3) corporations keep separate accounts for lobbying and non-lobbying activities, and eliminated any tax deduction for contributions to the lobbying account.[29/] The less restrictive "mere bookkeeping" alternative was similarly available in *Rust*.[30/]

[28/](...continued)
It would thus do no good to tell the station that it could set up a second entity to do its editorializing, unless that entity could use the station's license for that purpose. Because the restriction was coextensive with the opportunity to speak (*i.e.*, the possession of a license), there was no meaningful alternative channel for protected speech, and the condition was therefore unconstitutional.

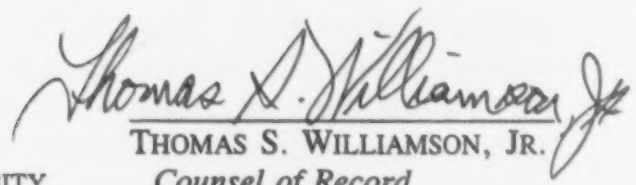
[29/] This is particularly true if one accepts Petitioners' twofold argument that (a) Congress's interest is limited "to insur[ing] that [its] funds . . . [are] used to support only the activities that Congress [is] willing to have subsidized," Pet. 25, and (b) Congress is *not* entitled to prevent misperceptions about the use of those funds unless it is delivering a pointed government message. After all, there was no specific articulable government message in *TWR*.

[30/] The *Rust* Court did find in a footnote that "the regulations are narrowly tailored to fit Congress' intent in Title X that federal funds not (continued...)

CONCLUSION

For the reasons set forth herein, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,



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October 19, 1998

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[20](...continued)
be used to 'promote or advocate' abortion as a 'method of family planning.'" 500 U.S. at 195 n.1 The Court did not suggest that such narrow tailoring was *required*, however, and a footnote would be a strange place to put the point if it was in fact determinative of the case. In any event, if this footnote represents strict scrutiny, then it is a holding that "mere bookkeeping" separation is insufficient to satisfy Congress's interest in limiting a subsidized program, and that Congress may require separation of facilitates and staff in order to ensure that no cross-subsidization or perception of subsidization occurs.

(3)

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SUPREME COURT, U.S.

No. 98-296

In the Supreme Court of the United States

OCTOBER TERM, 1998

LEGAL AID SOCIETY OF HAWAII, ET AL., PETITIONERS

v.

LEGAL SERVICES CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether certain restrictions placed on the activities of recipients of federal Legal Services Corporation funds by the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, and the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, are facially unconstitutional.

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No. 98-296

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v.

LEGAL SERVICES CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 145 F.3d 1017. The opinion of the district court (Pet. App. 37a-68a) is reported at 981 F. Supp. 1288.

JURISDICTION

The court of appeals entered its judgment on May 18, 1998. The petition for a writ of certiorari was filed on August 17, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1974, Congress enacted the Legal Services Corporation (LSC) Act (1974 Act), Pub. L. No. 93-355, 88 Stat. 378, 42 U.S.C. 2996 *et seq.*, creating the LSC as an independent, non-profit corporation to "provide financial assistance to qualified programs furnishing legal assistance to eligible clients." 1974 Act, § 1006(a)(1)(A), 42 U.S.C. 2996e(a)(1)(A). The Act authorizes the LSC to make grants to, and to contract with, individuals, organizations and, in certain limited circumstances, state and local governments, for the purpose of providing legal assistance to eligible clients. *Ibid.* LSC receives funds annually from Congress to provide such financial assistance. Pet. App. 9a. Programs, individuals, and other entities receiving such assistance from LSC are defined as "recipient[s]" under the Act. 1974 Act, § 1002(6), 42 U.S.C. 2996a(6). The Act limits LSC financial support to "legal assistance in noncriminal proceedings or matters" for "persons financially unable to afford legal assistance." 1974 Act, § 1003(a), 42 U.S.C. 2996b(a).

In addition to restricting use of LSC funds to financially needy clients and prohibiting financial assistance in criminal matters, the LSC Act has, from the outset, prohibited LSC recipients from, *inter alia*, making available any LSC funds, program personnel or equipment to any political party, to any political campaign, or for use in "advocating or opposing any ballot measures." 1974 Act, § 1006(d)(3) and (4), 42 U.S.C. 2996e(d)(3) and (4). The Act has also prohibited LSC funds from being used to influence any governmental agency action or legislation, except upon request or when necessary to represent an eligible client. 1974 Act, § 1007(a)(5), 42 U.S.C. 2996f(a)(5). And it has pro-

hibited LSC funds from being used to provide legal assistance with regard to any proceeding relating to any nontherapeutic abortion, elementary or secondary school desegregation, or military desertion or violation of the selective service statute. 1974 Act, § 1007(b)(7)-(9), 42 U.S.C. 2996f(b)(8)-(10). Finally, the Act has from the outset prohibited recipients' attorneys from bringing any class action suits directly, or through others, unless express approval was obtained from the recipient's project director according to established policies. 1974 Act, § 1006(d)(5), 42 U.S.C. 2996e(d)(5). The 1974 Act restrictions apply to recipients' activities funded by LSC funds as well as by other nonpublic and nontribal funds. 1974 Act, § 1010(c), 42 U.S.C. 2996i(c).

b. In 1996, in the context of proposals to eliminate LSC altogether because of controversy over certain activities pursued by some recipients, Congress enacted compromise legislation that expanded the scope of restrictions on the activities of LSC recipients. Pet. App. 10a. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(d)(1), 110 Stat. 1321-56 (1996 Act). Congress continued the restrictions in the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 502(a), 110 Stat. 3009-59 (1997 Act), and in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 502(a), 111 Stat. 2510-2511. See Pet. App. 13a & n.2.

Under the 1996 and 1997 Acts, recipients may not represent aliens who are unlawfully present in the United States except in cases of domestic violence, 1996 Act, § 504(a)(11), 110 Stat. 1321-54; 1997 Act, § 502(a)(2)(C), 110 Stat. 3009-60; "participate[] in any litigation on behalf of a person incarcerated in any

Federal, State, or local prison," 1996 Act, § 504(a)(15), 110 Stat. 1321-55; or represent people allegedly engaged in illegal drug activity in public housing eviction proceedings, 1996 Act, § 504(a)(17), 110 Stat. 1321-56. Recipients also may not initiate or participate in class action lawsuits, 1996 Act, § 504(a)(7), 110 Stat. 1321-53; litigate or lobby in an effort to reform the federal or state welfare laws or systems, 1996 Act, § 504(a)(16), 110 Stat. 1321-55; claim or collect attorney's fees, 1996 Act, § 504(a)(13), 110 Stat. 1321-55; or participate "in any litigation with respect to abortion," 1996 Act, § 504(a)(14), 110 Stat. 1321-55. The Acts require a written statement of facts by each legal aid organization prior to initiating litigation or pre-litigation negotiations, to be kept on file and made available to any federal agency that is auditing or monitoring the LSC. 1996 Act § 504(a)(8), 110 Stat. 1321-53. The restrictions apply to recipients' use of both LSC and non-LSC funds. See 1996 Act, § 504(d)(1) and (2), 110 Stat. 1321-56. Recipients must notify private parties who provide them with funds "that the funds may not be expended for any purpose prohibited" by the statute. 1996 Act, § 504(d)(1), 110 Stat. 1321-56.[1]

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[1] Since 1974, other provisions of the LSC Act have provided that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 1974 Act, § 1001(6), 42 U.S.C. 2996(6); see also 1974 Act, § 1006(b)(3), 42 U.S.C. 2996e(b)(3) (LSC "shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association * * * or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional

c. Shortly after the passage of the 1996 Act, LSC published regulations to implement the new statutory restrictions. See 61 Fed. Reg. 41,960 (1996); *id.* at 63,749. Coupled with pre-existing guidelines, the regulations applied the new restrictions not only to recipients but also to any "interrelated" organization, defined as an organization controlled by a recipient such that the recipient determined "the direction of management and policies" or influenced them "to the extent an arm's length transaction may not be achieved." See Pet. App. 13a (quoting 50 Fed. Reg. 49,276, 49,279 (1985)). The regulations also applied the restrictions to any entity that received a transfer of funds from an LSC recipient. 61 Fed Reg. at 63,752. If the funds transferred to the entity were LSC funds, the restrictions applied to all of the transferee entity's activities; if an LSC recipient transferred private funds, the restrictions applied only to the transferred funds. *Ibid.*

2. a. In January 1997, petitioners—several legal services organizations that receive LSC funds, an association of legal services clients, two organizations that fund work by legal services organizations, and individual legal services lawyers (Pet. App. 13a-14a)—brought the instant action against the Legal Services Corporation in federal district court. They alleged that the 1996 and 1997 Acts and the implementing LSC regulations were facially invalid under the First and Fifth Amendments of the United States Constitution to the extent they prevented LSC re-

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responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.").

cipients from spending non-federal funds to pursue activities protected by the First Amendment. Petitioners alleged that certain restrictions denied them equal protection and due process. Petitioners sought preliminary injunctive relief against enforcement of the new restrictions. Pet. App. 13a-14a.

The district court granted in part and denied in part the motion for a preliminary injunction. Pet. App. 69a-112a. The court denied relief with regard to certain of the challenged restrictions because they "do[] not implicate [petitioners'] constitutional rights," including the restriction on representing undocumented aliens except in cases of domestic violence (*id.* at 79a-80a); the prohibition on pursuing class actions (*id.* at 81a-82a); the prohibition on LSC grant recipients' seeking or collecting attorney's fees (*id.* at 82a); and the requirement that recipients prepare a statement of facts before engaging in litigation or negotiation (*id.* at 82a-83a).

The district court preliminarily enjoined enforcement of the remaining restrictions challenged by petitioners. Pet. App. 103a-104a. The court found that petitioners had a "significant likelihood of success" on their claim that those provisions place unconstitutional conditions upon the receipt of federal funds. *Id.* at 96a-97a. The court held that, under the standards enunciated in *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984); and *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), Congress may restrict the use of funds in conjunction with a subsidized program only if adequate alternative channels exist whereby the grant recipients can pursue the unsubsidized activities. Pet. App. 89a-90a. The court found that the LSC's regulations did not allow a recipient to form an affiliate organization through which it could pursue restricted activities with non-LSC funds

and, therefore, did not provide alternative channels through which recipients could exercise their First Amendment rights. *Id.* at 91a-96a.

b. Following entry of the preliminary injunction, LSC announced its intention to amend its regulations to allow recipients "to have an affiliation or relationship with separate organizations which may engage in prohibited activities funded solely with non-LSC funds" in the same manner as was approved for separate projects in *Rust*, and it issued interim regulations addressing that issue on March 14, 1997. 62 Fed. Reg. 12,101, 12,102. On May 21, 1997, LSC issued final regulations that amended the interim regulations in significant part. *Id.* at 27,695 (codified at 45 C.F.R. Pt. 1610).

Under the final regulations, an LSC recipient may create an affiliate that may spend non-federal funds on activities that the recipient itself is restricted from engaging in ("restricted activities") so long as the recipient maintains its "objective integrity and independence" from the affiliate. 45 C.F.R. 1610.8(a). A recipient "will be found to have objective integrity and independence" from an affiliate if: (1) the affiliated organization is a "legally separate" organization; (2) the affiliate "receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities"; and (3) the recipient is "physically and financially separate" from the affiliate. The third criterion requires more than mere bookkeeping separation. 45 C.F.R. 1610.8(a)(1)-(3). Satisfaction of that third criterion is to be determined on a case-by-case basis according to the "totality of the facts," including, but not limited to: "(i) [t]he existence of separate personnel; (ii) [t]he existence of separate accounting and timekeeping records; (iii) [t]he degree of separation from facilities in which restricted activities occur, and the extent of such restricted activi-

ties; and (iv) [t]he extent to which signs and other forms of identification which distinguish the recipient from the [affiliated] organization are present." 45 C.F.R. 1610.8(a)(3)(i)-(iv).[2]

c. On April 14, 1997, the United States intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the restrictions. Pet. App. 40a. LSC and the United States (collectively respondents) both moved for summary judgment, arguing that, as implemented by the final LSC regulations, the statutory restrictions do not violate petitioners' constitutional rights. Petitioners opposed that motion and filed their own motion for summary judgment. *Ibid.*

The district court denied petitioners' motion for summary judgment, concluding that LSC's final regulations cured the constitutional defects that had led the court to issue the preliminary injunction, and it granted summary judgment to respondents because petitioners failed to raise a material issue of fact regarding the constitutional validity of the LSC regulations. Pet. App. 45a. The court held that, by allowing an LSC recipient to establish a legally separate organization with separate personnel and facilities, the regulations leave open an adequate alternative channel for the exercise of constitutional rights. *Id.* at 44a-45a.

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[2] The final regulations also amend the rule governing the transfer of funds to provide that the restrictions apply only when an LSC recipient transfers LSC funds to another person or entity. When a person or entity receives LSC funds from a recipient, that person or entity is subject to the restrictions with respect to its LSC and non-LSC funds. 45 C.F.R. 1610.7. However, a person or entity that receives non-LSC funds from an LSC recipient is not subject to any of the restrictions. See 62 Fed. Reg. 27,695, 27,696-27,697 (1997).

The court noted that the requirement for separate personnel and facilities (the insularity requirement) was modeled after the regulations upheld by this Court in *Rust*. Pet. App. 46a. The court rejected petitioners' attempt to distinguish *Rust* as a case that involved different bookkeeping problems for physicians, that involved a governmental message, and that did not involve litigation. The court found that there was no relevant bookkeeping distinction, that Congress did not control the analysis and advice of either a *Rust* physician or an LSC lawyer, and that the role of litigation would be relevant only if petitioners had raised vagueness or overbreadth challenges to the restrictions, which they had not. *Id.* at 47a-49a. The court further concluded that the practical difficulties with abiding by the insularity requirement cited by petitioners did not render the requirement unconstitutional, because petitioners retain many practical means of complying with the restrictions without sacrificing First Amendment rights. *Id.* at 51a-55a. The court emphasized that it read the LSC regulations to allow a recipient to exercise control over an affiliate that engages in restricted activities, if the affiliate otherwise meets the insularity requirement, so that the affiliate would provide an alternative channel through which the recipient could engage in activities protected by the First Amendment, thereby defeating petitioners' facial challenge. *Id.* at 56a-60a.

The court also upheld, against First Amendment challenge, the requirement that an affiliate organization be a "legally separate entity" from the recipient, rather than merely a separate project of the recipient, as was the case under the *Rust* regulations. The court noted that the separate incorporation requirement narrows the availability of alternative channels more than in

Rust only to a de minimis extent (Pet. App. 50a), does not in any significant way add to petitioners' burden (*id.* at 56a), and, standing alone, was found not to be unduly burdensome by this Court in *Taxation With Representation*, 461 U.S. at 544 n.6. Pet. App. 55a-56a.[3]

With regard to petitioners' assertion of numerous due process and equal protection claims of indigent clients, the district court held that only one plaintiff, the California State Client Council, had standing to assert them. Pet. App. 60a-62a. As for the due process claims, assuming that the clients had the constitutional rights claimed, the court ruled that, under *Rust*, the LSC regulations do not violate such rights because the indigent clients retain the same choices they would have had absent the federal government's creation of LSC. *Id.* at 62a-64a. And the court held that the LSC regulations do not violate equal protection because they are supported by a rational basis. *Id.* at 65a-66a.[4]

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[3] The district court noted that petitioners belatedly attempted to raise a viewpoint discrimination claim, but it rejected that claim under the *Rust* rationale because the government may fund legal representation in certain cases it believes to be in the public interest and not fund others without engaging in unconstitutional viewpoint discrimination. Pet. App. 66a-67a n.20.

[4] The district court noted that, at the summary judgment stage, petitioners had attempted to make a new argument that the court should apply a least-restrictive-alternative standard; but the court concluded not only that that standard is inapplicable because petitioners' constitutional rights are not infringed, but also that, even under that standard, petitioners would not prevail because the LSC regulations "are as narrowly tailored [as those] in *Rust* and the burdens do not exceed those upheld in *Rust*." Pet. App. 43a n.3.

3. The court of appeals affirmed in relevant part.[5] In an opinion by retired Associate Justice White, sitting by designation pursuant to 28 U.S.C. 294(a), the court held that neither the challenged Acts of Congress nor the implementing LSC regulations impose unconstitutional conditions on LSC fund recipients' exercise of First Amendment rights. Pet. App. 2a, 9a.[6] The court noted that the LSC regulations requiring "[a] distinction between restricted and unrestricted organizations are nearly identical to the regulations upheld in *Rust* and there is no basis for distinguishing this case from *Rust*." *Id.* at 18a. Thus, the court of appeals explained, "the Court's discussion in *Rust* of why the Secretary's regulations were constitutional controls the disposition of this case." *Id.* at 21a. As in *Rust*, the court reasoned, the government here is not denying a benefit to anyone on the basis of First Amendment activity, but is "instead simply insisting that public funds be spent for the purposes for which they were authorized." *Ibid.* (quoting *Rust*, 500 U.S. at 196). Moreover, the court continued, LSC recipients are not being required to give up prohibited activities, but are merely being required to keep such activities separate from LSC-

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[5] The court of appeals vacated the district court's judgment regarding the due process and equal protection claims based on rights of indigent clients, and remanded the case with directions to dismiss those claims, because petitioners failed to establish that they had standing to raise them on behalf of the indigent clients. Pet. App. 9a, 36a. Petitioners do not raise those claims in this Court.

[6] The court emphasized that petitioners failed to satisfy the stringent standard required for their facial challenges to the LSC regulations. Pet. App. 16a, citing *Rust*, 500 U.S. at 183 (in facial challenge, plaintiff "must establish that no set of circumstances exists under which the Act would be valid").

funded functions by conducting them "through entities that are separate and independent" from the LSC recipient. *Ibid.*

The court of appeals, like the district court, specifically rejected petitioners' various attempts to distinguish *Rust*. The court held that use of the term "recipients" in the LSC regulations, rather than "projects" as in *Rust*, is not significant because "[t]he proper constitutional test does not focus on the particular term used by the government agency, but whether the regulations 'effectively prohibit [ ] the recipient from engaging in the protected conduct outside the scope of the federally funded program.' 500 U.S. at 197. * * * The LSC regulations pass this test." Pet. App. 22a. The court explained that the regulations simply call for the same degree of separation as in *Rust*, with the added requirement of a separately incorporated entity—a requirement that is consistent with *Taxation With Representation*, 461 U.S. at 544 n.6 (requiring separate incorporation of tax-exempt organization and lobbying entity that is not tax-exempt), and with *League of Women Voters*, 468 U.S. at 400 (noting that a requirement that noncommercial television and radio stations receiving federal funds establish affiliates to editorialize with nonfederal funds would plainly be valid). Pet. App. 23a-24a.

The court of appeals rejected petitioners' speculation that LSC might apply the regulations in such a way as to make it financially impossible for recipients to engage in restricted activities. The court concluded that such speculation is inadequate to support a facial challenge, Pet. App. 25a-26a, and that it is not unconstitutional to require additional efforts by a recipient to engage in restricted activities, especially here, where

the filing of incorporation papers by an entity employing attorneys is not a significant burden, *id.* at 26a-27a.

Finally, the court of appeals rejected petitioners' contention that *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), renders the challenged restrictions unconstitutional because, according to petitioners, LSC "is a program designed to encourage private speech and therefore the restrictions are subject to heightened scrutiny." Pet. App. 27a. The court reasoned that, unlike in *Rosenberger*, where the government expended funds to encourage a diversity of views from private speakers, "the LSC program is designed to provide professional services of limited scope to indigent persons, not [to] create a forum for the free expression of ideas." *Ibid.* The court similarly rejected the contention that the restrictions should be evaluated under a compelling interest standard, pointing out that a recipient voluntarily receives LSC funding and consents to the restrictions, that the recipient remains free to engage in the activities at issue through a separate entity, and that, contrary to petitioners' assertion, *Rust* did not apply such a standard. *Id.* at 28a-29a.[7]

ARGUMENT

The court of appeals correctly held that the restrictions imposed by the challenged Acts of Congress on

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[7] The court rejected petitioners' contention that the LSC regulations violate the First Amendment insofar as they prohibit a full-time legal services lawyer from engaging in the outside practice of law. The court noted that such a limitation is common in government agencies and is "a consequence of that attorney's decision to accept full-time employment with a LSC funded organization." Pet. App. 29a-30a.

activities of organizations that receive funds from the Legal Services Corporation (LSC) are not facially invalid under the First Amendment. That ruling was based on a straightforward application of this Court's precedents and does not conflict with any decision of any other court of appeals. Review by this Court therefore is not warranted.

1. a. The decision of the court of appeals does not conflict with the decision of any other federal court. In fact, in another challenge to the LSC restrictions, the United States District Court for the Eastern District of New York denied the plaintiffs' request for a preliminary injunction to enjoin the restrictions. *Velazquez* v. *LSC*, 985 F. Supp. 323 (1997), appeal pending, No. 98-6006.

The court of appeals' decision also is fully consistent with this Court's precedents. It is, of course, clear that Congress has broad power to specify the purposes for which funds appropriated out of the Federal Treasury may be spent. See U.S. Const. Art. I, § 9, Cl.7. It also is well settled that Congress may provide that federal funds may not be used to support particular activities that also are supported by non-federal funds—even if the activities involved are of the sort that are fully protected by the First Amendment when engaged in solely by private parties—so long as the fund recipient is allowed to form an affiliate organization to receive and spend non-federal funds to engage in the protected activities. See, *e.g.*, *FCC* v. *League of Women Voters*, 468 U.S. 364, 400 (1984). Congress also may require that such an affiliate organization be kept "physically and financially separate" from the recipient organization. *Rust* v. *Sullivan*, 500 U.S. 173, 180, 187-190 (1991).

The Court has, on several occasions, rejected contrary arguments akin to those pressed by petitioners

here. In *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), the Court rejected a challenge to Section 501(c)(3) of the Internal Revenue Code, which forbids tax-exempt organizations from engaging in lobbying. The Court held that the restriction on lobbying activity did not place an unconstitutional condition on the receipt of a tax benefit because the organization could create a separate affiliate to engage in lobbying activity. *Id.* at 544. The Court explained: "The IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying. This is not unduly burdensome." *Id.* at 545 n.6.

In *League of Women Voters*, 468 U.S. at 381-402, the Court struck down a statutory provision that prohibited federally subsidized radio stations from broadcasting editorial opinions, in part because a station "is not able to segregate its activities according to the source of its funding" and has "no way of limiting the use of its federal funds to all noneditorializing activities." *Id.* at 400. The Court recognized, however, that "if Congress were to adopt a revised version of [the statute] that permitted noncommercial educational broadcasting stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid." *Ibid.*

In *Rust*, the Court sustained regulations implementing Title X of the Public Health Service Act that prohibited the use of federal funds "in programs where abortion is a method of family planning." 500 U.S. at 178. The regulations prohibited Title X projects from, among other things, counseling patients regarding abortion, referring patients to abortion providers,

lobbying for legislation to increase the availability of abortion, and using legal action to make abortion available. See *id.* at 180. The regulations also required that Title X projects be organized so that they are "physically and financially separate" from prohibited abortion-related activities. Under that provision, the federally funded project was required to have "objective integrity and independence" from prohibited activities, beyond mere bookkeeping separation. *Id.* at 180-181. The Court held that the regulations did not violate the First Amendment, because "[b]y requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in *League of Women Voters* and *Regan* [v. *Taxation With Representation*], not denied it the right to engage in abortion-related activities." *Id.* at 198. Rather, "Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program." *Ibid.*

The LSC restrictions at issue here pass muster under the standards enunciated in *Taxation With Representation*, *League of Women Voters*, and *Rust*. The statutory restrictions, as interpreted by LSC in its final regulations, allow recipients to create and control affiliates that may furnish restricted legal services with non-LSC funds, thereby providing a means by which the recipients may engage in activity protected by the First Amendment. As noted by the courts below, the challenged regulations are substantially the same as those upheld in *Rust*. See Pet. App. 19a-21a (comparing the two sets of regulations); *id.* at 46a-47a n.6 (same). Like the *Rust* regulations, the LSC regulations require

"physical and financial separation" as part of a requirement that the LSC recipient and its affiliate maintain "objective integrity and independence." Compare 45 C.F.R. 1610.8 with 42 C.F.R. 59.9. Sufficient physical and financial separation under the LSC program is determined on a case-by-case basis using the same factors used in the *Rust* regulations: the existence of "separate personnel," "separate accounting and timekeeping records," the "degree of separation from facilities in which restricted activities occur," and the presence of "forms of identification which distinguish the recipient" from the affiliate. Compare 45 C.F.R. 1610.8 with 42 C.F.R. 59.9.

In some respects, the LSC restrictions are more permissive than those at issue in *Rust*, because the latter contained a rule that prevented physicians in the program from referring a patient to an abortion provider or even mentioning abortion as a method of family planning. See 500 U.S. at 180. The LSC regulations contain no comparable restriction. Recipients are free to discuss client options that include restricted activities and to refer clients to organizations that provide restricted services—including an affiliate organization established by the recipient. The one requirement in the LSC regulations that was not in the *Rust* regulations—that a recipient and its affiliate organization be "legally" separate entities (45 C.F.R. 1610.8)—does not alter the analysis, because such a requirement was held by this Court in *Taxation With Representation* not to constitute an undue burden. 461 U.S. at 544-545 n.6.

The LSC regulations plainly allow for adequate alternative channels for petitioners to engage in activities protected by the First Amendment. If an LSC recipient avails itself of the affiliate structure, its ability to use non-federal contributions is subject to restrictions

only if a donor makes a specific choice to give the money to the recipient rather than to its non-LSC affiliate after having received written notification that that choice would make the contribution subject to the same restrictions as federal funds. Such a scheme is constitutional under *Taxation With Representation*, *League of Women Voters*, and *Rust*.

b. The lower courts correctly rejected petitioners' attempts (Pet. 16-23) to distinguish *Rust*. The fact that the LSC restrictions apply to recipients of funds rather than to programs (see Pet. 18-20) is not of constitutional significance. Nothing in *Rust* suggests that allowing the creation of a separate "project" was the only way for government regulations to avoid an impermissible burden of First Amendment interests. In fact, the *Rust* Court illustrated how the government could achieve the same result by using the "affiliate" option recognized as valid in *League of Women Voters* and *Taxation with Representation*. 500 U.S. at 197-198.

Petitioners' claim (Pet. 20-21) that the applicability of the LSC restrictions to attorneys somehow distinguishes this case for constitutional purposes from *Rust*, which involved a program that applied to physicians, is without merit. In *Rust*, the Court held that the "doctor-patient relationship established by the Title X program" in *Rust* was not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." 500 U.S. at 200. Here, however, the concerns identified by the Court in *Rust* with respect to physicians in a counseling relationship do not even directly arise. Unlike the doctors in *Rust*, who were subjected to a rule that prohibited them from even counseling patients about receiving an abortion elsewhere, LSC recipient attorneys remain free to inform their clients that certain litigation

is beyond the scope of LSC funding and to refer those clients to an affiliate organization or other lawyers who can handle such litigation. Thus, LSC recipient attorneys may furnish such advice as an alternative to entering into a full attorney-client relationship. Furthermore, the attorney-client relationship that might arise with an LSC attorney is not so all encompassing as to justify an expectation on the part of the client of comprehensive legal services, because of the significant restrictions that have been placed on the scope of representation by LSC-funded attorneys from the creation of LSC, including prohibitions against representing clients in criminal matters, school desegregation, certain abortion cases, and selective service cases, as well as special limitations on class action filings. Simply put, and contrary to petitioners' suggestion (Pet. 21 & n.20), Congress never intended for LSC attorneys to provide all forms of legal services to their clients; Congress intended for them to furnish those types of legal services that it believed would best serve the public interest.

Petitioners err in contending (Pet. 21-22) that *Rust* does not apply here because, unlike the Title X program in *Rust*, which was designed to convey a governmental message, the LSC program is designed to encourage private speech. As the court of appeals recognized, petitioners borrow that distinction from *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), where the Court noted that *Rust* "did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program." The court of appeals correctly found, however, that LSC funding is not a program akin to the one at issue in *Rosenberger*, which was designed to encourage diverse private

expression and which, in essence, constituted a limited public forum for such private expression. *Id.* at 829-830; see *NEA* v. *Finley*, 118 S. Ct. 2168, 2178 (1998); see also *id.* at 2184 (Scalia, J., concurring) (*Rosenberger* "found the viewpoint discrimination unconstitutional, not because funding of 'private' speech was involved, but because the government had established a limited public forum"). The LSC program, by contrast, is not a program dedicated to the promotion of diverse private expression—it exists to subsidize certain discrete legal services and activities. Any limitations on LSC recipients' speech are but an incidental result of the program's restrictions on certain types of activities. Such an incidental limitation on the use of federal funds for expressive purposes is "not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in *activities* outside of the project's scope." *Rust*, 500 U.S. at 194 (emphasis added).

2. Petitioners suggest (Pet. 23-29) that certiorari should be granted to clarify the standard for determining when a funding restriction imposes unconstitutional conditions. At the same time, petitioners recognize that, in the past, the Court has addressed that question on a case-by-case basis with an analysis that "was tailored to the specific facts and necessities of the particular case." Pet. 26. In essence, petitioners urge the Court to review this case to adopt a more stringent standard than the Court's precedents support, *i.e.*, a new standard that would require the government to prove that restrictions on activities of federal fund recipients are "*necessary* in a particular case to insure that its funding limits are respected." Pet. 24. Petitioners contend that the restrictions here would not meet that standard because, in their view, accounting

separation, accompanied by disclaimers, should suffice. Pet. 27-28.[8]

The court of appeals correctly rejected this attempt by petitioners to inject a form of strict scrutiny into the case, requiring that government restrictions be "necessary" to preserve the funding decisions of Congress. In *Taxation With Representation*, the Court expressly rejected the contention that strict scrutiny applied, holding that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." 461 U.S. at 549. In *League of Women Voters*, the Court applied heightened scrutiny in a case where the statutory restriction did not provide an alternative channel for First Amendment expression, 468 U.S. at 381-399, but specifically went on to state that the statute "would plainly be valid" if it allowed for an affiliate structure. *Id.* at 400. In *Rust*, the Court found that the regulations did not abridge First Amendment rights, without any requirement of a showing that the restrictions were narrowly tailored to achieve a substantial interest. The *Rust* Court held that by requiring a recipient to engage in restricted activity separately, Congress has "not denied it the right to engage in abortion-related activities" but "has merely refused to fund such activities out of the public fisc." 500 U.S. at 198. Thus, rather than analyze the government's interest in interfering with First Amendment

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[8] In a footnote (Pet. 23 n.21), petitioners attempt to raise an argument that the LSC restrictions aim at the suppression of particular viewpoints. That claim must fail because, just as in *Rust*, Congress has simply declined to fund certain legal activities and has provided for a degree of separation between an LSC recipient and an affiliate to safeguard the integrity of the federal program.

rights, the Court held that the restrictions did not materially interfere with such rights in the first place.[9] The same principle governs the instant case.

Moreover, even if one were to apply petitioners' proposed legal standard, the LSC restrictions would meet that standard. The same governmental interests served by the *Rust* regulations are served by the LSC's program regulations. See Pet. App. 43a n. 3 (district court rejected petitioners' belated argument for a least restrictive alternative standard because petitioners' constitutional rights were not infringed and, alternatively, found that even if that standard applied, the LSC restrictions are valid because they are "as narrowly tailored [as] in *Rust* and the burdens do not exceed those upheld in *Rust*"). As in *Rust*, the government restrictions at issue here ensure that federal funds are used only for "federally authorized purposes," and "that grantees avoid creating the appearance that the Government is supporting [the restricted] activities." 500 U.S. at 188.

LSC's separate-entity requirements promote the government's interest in using federal funds to address certain basic legal needs of the poor and to avoid any indirect subsidy of restricted activities. Congress made clear when it enacted the restrictions that "it is in-

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[9] The only reference in *Rust* to "narrow[] tailor[ing]" appears in a footnote stating that the Court "also" finds that the regulations are narrowly tailored to fit Congress's intent that federal funds not be used to promote or advocate abortion. 500 U.S. at 195 n.4. If, as petitioners contend, narrow tailoring is an essential element of the analysis, the *Rust* Court would have addressed the issue as a threshold matter rather than note it in a fashion suggesting an alternative analysis. In any event, the *Rust* footnote indicates that, even under such an alternative analysis, the LSC restrictions are sufficiently tailored.

appropriate for Federal resources to be used to support directly or indirectly these [prohibited] activities," since such activities "only further drain much needed resources from the program's core mission—to provide basic legal aid to poor individuals." H.R. Rep. No. 196, 104th Cong., 1st Sess. 121 (1995); see also S. Rep. No. 392, 104th Cong., 2d Sess. 7 (1996) ("[M]any legal services grantees currently receive funds from both public and private sources[.] Since the money is basically fungible, it would be difficult if not impossible to place restrictions only on the Federal funds."). Congress also emphasized the importance of avoiding the outward appearance of unauthorized use of federal funds. See 138 Cong. Rec. H2994 (daily ed. May 6, 1992) (statement of Rep. McCollum); S. Rep. No. 392, *supra*, at 7 ("the public cannot differentiate between LSC advocacy subsidized with public versus private funds"); 141 Cong. Rec. S14,588 (daily ed. Sept. 29, 1995) (statement of Sen. Hollings) (LSC restrictions enacted to "maintain the integrity of the program"); 142 Cong. Rec. S1963 (daily ed. Mar. 13, 1996) (statement of Sen. Domenici) (LSC restrictions enacted to "protect LSC from the negative perceptions of those who wish to see its termination").

Finally, petitioners' repeated references to the allegedly burdensome nature of the restrictions provide no basis to conclude that the LSC restrictions are unconstitutional. Petitioners failed to make the requisite showing to support their facial challenge to the statutory provisions and implementing regulations. As the court of appeals made clear (Pet. App. 25a-26a), LSC regulations provide that no one factor is determinative in deciding whether an affiliate structure meets the separation requirements. Rather, LSC will make case-by-case determinations. The fact that the

restrictions apply to all LSC recipients (Pet. 29-30 n.31) does nothing to show that the LSC restrictions will operate in such a burdensome manner that they are invalid on their face.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1998

LEGAL AID SOCIETY OF HAWAII, *et al.*,

Petitioners,

—v.—

LEGAL SERVICES CORPORATION and
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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I. Introduction

While respondents offer various reasons for opposing *certiorari*, neither the Legal Services Corporation ("LSC") nor the United States government seriously disputes the importance of the issues raised by this case. In a nation committed to the rule of law, the imposition of severe and unprecedented restrictions on the ability of legal services lawyers to represent their indigent clients simply cannot be dismissed as insubstantial or trivial. To their credit, respondents do not even try. If anything, they implicitly concede that the question of whether and how poor people in this country can obtain access to justice is a fundamental one by any definition.

Given that common starting point, respondents rest their argument against review on two other grounds. First, they note that there is no conflict in the circuits. Second, they insist that the decision by the Ninth Circuit upholding the challenged restrictions is fully consistent with existing Supreme Court law. We acknowledge the former; we disagree vigorously with the latter.

To support their claim that this case involves nothing more than the application of previously settled law, respondents are forced to defend an extraordinarily broad proposition. According to respondents, this Court's cases establish the principle that once the federal government provides funding of any amount, it can impose a laundry list of restrictions on its grant recipients, notwithstanding the impact those restrictions have on the exercise of constitutionally protected rights and regardless of whether those restrictions are necessary to preserve the integrity of Congressional funding limitations. The only limitation on the federal government's power that respondents seemingly recognize is that grant recipients be allowed the option (however unrealistic it may be in the overwhelming number of cases) to create a separate entity to carry on the

restricted activities with separate management, separate staff and separate facilities.

In an era of nearly ubiquitous federal funding, the practical consequences of respondents' position for constitutional liberty in this country are indeed perilous. Extrapolating from the rule that the government is under no obligation to subsidize the exercise of constitutional rights, respondents read this Court's cases as permitting the government to use the power of its purse to inhibit the exercise of constitutional rights, even when the exercise of those rights is funded entirely by private money.

As set forth in our petition, we do not believe that this Court's cases go nearly so far. Rather, we believe that *Rust* v. *Sullivan*, 500 U.S. 173 (1991), *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), and *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), stand only for the more limited proposition that the government may take necessary steps to ensure that its money is spent only for its intended purposes. As those cases also demonstrate, the question of what steps are needed depends on the nature of the funded program and the character of the restrictions. Moreover, the government carries an extra burden of justification when it seeks to extend its regulatory power over a constitutionally sensitive arena (such as the provision of legal services) from restrictions on the use of the government's own money to restrictions on the use of nonfederal funds.

Thus, in *Regan*, charitable organizations that wanted to engage in lobbying were required to establish a separate corporate entity but were not otherwise required to separate their staffs and facilities. In *League of Women Voters*, the Court ruled that public broadcasting stations could not be barred from using private funds to engage in editorializing merely because they received public funds for other purposes. And, in *Rust*, the Title X restrictions

were upheld because they were seen as restrictions on a federally funded project rather than on the federal grantee.

To be sure, the implementing regulations adopted by the LSC in this case echo (although they do not precisely replicate) the regulations upheld by this Court in *Rust*. But by treating that fact as dispositive, respondents substitute analogy for analysis. The question is not whether LSC's regulations look like those in *Rust*. The question is whether the regulations that were deemed necessary and appropriate in *Rust* are necessary and appropriate here. If not, they should be struck down.

Finally, petitioners respectfully suggest that if this Court's cases in fact stand for the broad proposition that respondents assert, the present case provides an ideal opportunity to reexamine the constitutional jurisprudence of conditional funding so that it conforms, not conflicts, with the well-established rule that government may not accomplish indirectly what it may not do directly.

II. *Rust*

For respondents, and indeed for the Ninth Circuit, this case begins and ends with *Rust*. But respondents' single-minded reliance on *Rust* places them in an anomalous position. On the one hand, respondents argue that the disposition of this case requires nothing more than a comparison of the Title X regulations upheld in *Rust* and the LSC regulations challenged here. On the other hand, respondents only want to compare those portions of the regulations that in fact overlap. Thus, respondents are quick to abandon their literal reading of *Rust* when it does not suit their purpose. In particular, respondents insist that the two regulatory schemes should be treated identically despite the critical distinction that LSC grantees are barred from engaging in restricted activities except through the creation of a separate legal entity, while Title X grantees clearly are not.

This distinction was pivotal in *Rust*, and for very good reason. The federal government may have broad latitude in determining how its own funds are spent, but all parties agree that federal funding may not be conditioned on an agreement to relinquish the exercise of privately funded constitutional rights. *See, e.g.*, LSC Opp. at 13; U.S. Opp. at 16. Nor may the government avoid this constitutional rule by insisting that the constitutional rights of one group can just as easily be exercised by someone else. *See* Pet. at 20.

Of course, that is precisely the effect of the LSC regulations (but not the Title X regulations). Consequently, respondents shift rhetorical ground at this point in their argument and insist that the constitutionality of particular funding restrictions cannot be resolved by the slavish application of formal legal rules but instead demands a careful contextual analysis. Once having recognized the importance of context, however, respondents' literal-minded attempt to adopt wholesale the Title X regulations, and thereby render *Rust* dispositive of this case, irretrievably breaks down.

In *Rust*, Congress made funds available to pre-existing medical services organizations in order to allow those organizations to establish a federally-funded family planning program under the aegis of the existing organization. After repeatedly emphasizing[1] that Title X's restrictions were directed at a specific "project" and not at the "recipient" of federal funds, a majority of the Court found the restrictions imposed by Congress constitutional.

Here, by contrast, LSC's regulations take existing organizations (legal services grantees) and require them to cleave themselves into two inadequate halves if they wish

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[1] Literally, by repeated use of italics, *see* 500 U.S. at 196, 197.

to continue to receive federal funds. The point could not be more forcefully made than by the description on the very first page of LSC's Opposition brief in which it explains that for the past 25 years LSC grants have been made to pre-existing legal services organizations funded through a combination of LSC and non-LSC funds: "Congress envisioned that grantees [of LSC funds] would generate additional (nonfederal) financial support" for their activities. LSC Opp. at 1 (citing 42 U.S.C. §§ 2996e(a)(2), 2996i(c)). In fact, LSC notes that "applicants [for LSC funds] must describe a strategy for attracting non-LSC funds. As a practical matter, virtually all LSC grantee programs are funded with a combination of LSC and non-LSC funds from public and/or private sources." *Id.* The new restrictions on LSC recipients' use of their *nonfederal* funds thus undermine the ability of LSC recipients to operate *in the manner envisioned by LSC*.

Furthermore, as respondents point out, there have been some types of restrictions on the legal representation that LSC grantees could provide using LSC funds since the beginning of federal funding in the mid-1970s. *See* LSC Opp. at 3; U.S. Opp. at 2-3. Prior to 1996, those restrictions were implemented by a system of strict bookkeeping requirements. *See* 42 U.S.C. § 2996g(b); 45 C.F.R. § 1610.9. So far as the record in this case reflects, those bookkeeping requirements have been fully adequate to ensure that restricted federal funds are not spent on unapproved activities.

It is against this backdrop that the Ninth Circuit should have applied this Court's recent funding limitation decisions, including *Rust*. Had it done so, as opposed to looking simply at the language of LSC's regulations and comparing it to the Title X rules, we believe that it would have concluded that—whatever the ostensible similarity of language—the practical operation of the rules in this case

is on the *grantee* (which *Rust* forbids) rather than on a particular *project* (which *Rust* permits).

Equally important, LSC's attempt to equate this case with *Rust* stumbles over the critical fact that, unlike the situation in *Rust* in which a *single* entity (*i.e.*, an organization with unified management and day-to-day operational direction) was required to set up a new program within the organization, LSC's rules contemplate two entirely separate organizations joined *only* at the level of their respective volunteer Boards.[2] Thus, LSC has made clear that an LSC recipient and separate "affiliate" organization may not (unlike in *Rust*) share the critically important "executive director," the practical determinant of whether a recipient maintains control of an affiliate.[3] And while it is fine for respondents to eschew reliance upon the formalities of corporate organization, it is disingenuous of them to insist that allowing two otherwise wholly separate organizations to have overlapping Boards satisfies the constitutional obligation of allowing an LSC grantee to exercise *its* constitutional rights.[4]

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[2] *See* 45 C.F.R. § 1610.8 and comment thereto (App. 179a-181a, 167a).

[3] Memorandum from John Tull, Director, LSC Office of Program Operations, to all LSC Program Directors, Board of Chairs, re Certification of Program Integrity (Oct. 30, 1997), Addendum to petitioners' Ninth Circuit Reply Brief.

[4] This critical distinction between the situation in *Rust* and the case at bar further explains why—for all of LSC's efforts to dismiss the importance of requiring separate corporations here, but not under Title X—that difference matters. (In fact, since LSC chose to copy virtually all of the Title X rules, one might fairly assume that where it failed to do so there was an important reason in *its* view for making the distinction.) That difference is not simply a matter of organizational form but stems from the fact that Title X really was just a new, and separate, medical services program within (and under the direction of) a single pre-existing organization, whereas LSC requires the creation of a parallel legal services structure in which the two organizations

(footnote continued...)

III. Standard

Respondents acknowledge that the unconstitutional conditions doctrine precludes the government from requiring a recipient of federal funds to relinquish his or her constitutional rights as a condition of receiving a federal grant. However, they say, that limitation is permissible so long as federal funding restrictions leave open "adequate alternative channels" for the exercise of grantees' rights. Whether that *should be* the test or, as petitioners assert, there should be a more stringent test which requires the government to establish the necessity of its regulations or the absence of a less restrictive alternative, is a critical question. Where respondents err is in suggesting that it already has been answered. To the contrary, it is precisely because it *has not* been answered that the Court should grant *certiorari* here.

Respondents, in fact, are disingenuous in suggesting that this issue is a "story told" in this Court's jurisprudence. Thus, while respondents confidently assert that the "adequate alternative channels" test is endorsed by prior cases, neither that phrase nor any reasonable synonym for it appears anywhere in *Regan*, *League* or *Rust*, nor can the Court's decisions in those cases fairly be read to have addressed the issue. At best, those opinions appear to implicitly acknowledge the existence of a lurking "standards" issue that would need to be faced in some future case. Far from decisively addressing that question, earlier cases merely contain snippets of rhetoric which each side can point to as sustaining its position on the standards issue—a point which LSC reluctantly is compelled to concede. *See*, *e.g.*, LSC Opp. at 29 n.30

(continued from previous page)
not only are *legally* distinct but are joined together operationally only in the most tangential and functionally meaningless respects.

("[t]he *Rust* Court did find in a footnote that 'the regulations are narrowly tailored to fit Congress' intent' . . . "); *see also League*, 468 U.S. at 401 n.27 (referring to application of "less restrictive alternatives" test in the government funding context).

Fairly read, this Court's prior cases implicitly pose, but do not resolve, the question of whether "necessity," "adequate alternative channels" or some other legal standard regarding burden, presumption and proof is required when the government seeks to enforce its conceded right to limit its own funding by imposing restrictions that materially burden activities involving no expenditure of federal funds.

As set forth in the petition, petitioners believe that the logic of the unconstitutional conditions doctrine—and of this Court's First Amendment jurisprudence generally—demonstrates that the burden of justification in cases like the present one should lie with the government and that it should be a heavy one. *See* Pet. at 23-29. But the important point—in fact, the *only* point—for present purposes is that this is an exceedingly important question which has been left open by prior cases and ought to be addressed as a logical, and needed, follow-on to those decisions.

IV. Facial Challenge

As anticipated, respondents contend that petitioners improperly advance a "facial challenge" to the LSC statutes and regulations. Respondents argue that LSC has not yet interpreted its regulations and therefore petitioners can only "speculat[e]" as to how LSC will apply them, thus assertedly precluding a "facial" challenge. LSC Opp. at 23-26; U.S. Opp. at 23-24.

Respondents' "facial" challenge argument fundamentally misconceives petitioners' claim. Petitioners claim is that the doubly-restrictive regulations

in this case—requiring recipients of LSC funds to (i) use separate personnel, separate management and separate facilities if they want to engage in LSC-disfavored activities with non-LSC funds *and* (ii) create entirely separate legal entities to do so—*on their face* go beyond what this Court has permitted in *Rust*, *Regan* and *League*.

Specifically, neither *Rust*, *Regan* nor *League* suggests that the government may, as it has done in the present case, *compound* restrictions upheld in each of those cases. To the contrary, petitioners submit that those cases establish that the government may impose only the *minimum* restrictions necessary to meet its interests, not, as respondents and the court of appeals would have it, *as many* restrictions as the government may see fit to impose so long as some "channel" of expression remains open to the funding recipient.

No further, or individualized, analysis of particular interpretations of the relevant language of LSC's restrictions is necessary to see that those restrictions are unconstitutional. *Every* potential LSC grant applicant faces regulations which—if petitioners are correct—go well beyond what the Constitution tolerates. LSC's restrictions therefore are facially unconstitutional whether one applies the standard urged by the government (U.S. Opp. at 11 n.6)—that the challenger must establish that "no set of circumstances exists" under which a challenged statute would be valid (*United States* v. *Salerno*, 481 U.S. 739, 745 (1987))—or the standard which petitioners contend applies in the First Amendment context—that the challenger may establish that a statute is "substantially overbroad," *i.e.*, that it reaches a "substantial" amount of

protected conduct (*City of Houston* v. *Hill*, 482 U.S. 451, 458 (1987)).[5]

V. Conclusion

For the foregoing reasons, as well as those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[5] Contrary to LSC's contention (Opp. at 23 n.19), petitioners repeatedly have argued that their claims are governed by "overbreadth" analysis. *See, e.g.*, petitioners' Ninth Circuit Reply Brief at 24.

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